United States Court of Appeals

for the Second Circuit

APPENDIX

B
pgs

76-1011

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1011

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK LUCAS,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT, FRANK LUCAS

JEFFREY C. HOFFMAN,
Attorney for Appellant, Frank Lucas,
233 Broadway, Room 3501,
New York, New York 10007.
(212) 964-6226

UNITED STATES COURT OF APPEALS
FILED
MAR 26 1976
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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D. C. Form No. 106
CRIMINAL DOCKET

JUDGE COOPER

75 CRIM. 687

TITLE OF CASE	ATTORNEYS
THE UNITED STATES vs. 1. JOSEPH MAGNANO, a/k/a "Joe the Grind" 1-4 2. FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose", 1-4 3. RICHARD BOLELLA, 1-4 4. LOUIS MACCHIAROLA, a/k/a "Red Hot", 1-4 5. MICHAEL CARBONE, 1-4 6. DOMINIC TUFARO, a/k/a "Donnie Boy", 1-4 7. FRANK FERRARO, a/k/a "Skooch", 1-4 8. CARMINE MARGIASSO, a/k/a "Charlie", 1-4 9. ANTHONY DeLUTRO, a/k/a "Tony West", 1-9 10. ANTHONY SOLDANO, a/k/a "Tony", 1-9 11. JOSEPH MALIZIA, a/k/a "Patsy Pontiac", 13 12. ERNEST MALIZIA, 1 13. FRANK CARAVELLA, 13 14. JOHN GOVNN, 1, 10-11, 15, 16 15. WILLIAM CHAPMAN, a/k/a "Chappy", 1 16. ST. JULIAN HARRISON, 1-5 17. FRANK LUCAS, 1, 5-7 18. GERARD CACHOLAN, a/k/a "Coco", 1-11 19. ROBERTO RIVERA, and 1-17 20. GABRIEL RODRIGUEZ, a/k/a "Gus", a/k/a "Casanova", 1-17	For U.S.A. Dominic F. Amorosa, AUSA 791-1960 For Defendant: Stoheser & Epstein 100 Church Street, NYC 10007 962 1564 (Richard Bolella)

CASH RECEIVED AND DISBURSED				
NAME	RECEIVED		DISBURSED	

(07)

TOTAL COUNTS 21

21 USC 846, 841, 812, (a)(1)(b)

Conspr. to viol. Fed. Narco. Laws (Ct. 1)
Distr. & possess. w/intent to distr.
Heroin I. & Cocaine II. (Cts. 2-17)
(Seventeen Counts)

DATE	PROCEEDINGS
7-10-75	Filed indictment.
7-15-75	Deft. Magano (atty present Edward Panzer) enters plea of not guilty. Bail continued.
	Deft. Pallatta (atty present Jay Goldberg) enters plea of not guilty. Bail continued
	Deft. Bolella (atty present, Gilbert Epstein) enters plea of not guilty Bail continued.
	Deft. DeLutro (atty present) Enters plea of not guilty. Bail continued.
	Deft. Soldano (atty present) Robert Blossner Enters plea of not guilty. Bail continued.
	Deft. Govnn (atty present Edward D. Loughman enters plea of not guilty. Bail continued
	Deft. Chapman (atty present, Read) Enters plea of not guilty Bail continued.
	Deft. Cacholan (atty not present) Court enters plea of not guilty. Bail continued.
	Deft. Rivera Produced on Writ (atty not present) Court enters not guilty plea

(continued on next pg)

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DATE	PROCEEDINGS	CLERK'S FEES PLAINTIFF	CLERK'S FEES DEFENDANT
	Deft. Rodriguez Bench warrant ordered Issued Trial scheduled Sept 22, 1975 at 1:00 P.M. .....Cooper, J.		
7-15-75	FRANK LUCAS-Filed Govt's. affidavit for a writ of habeas corpus directed to Warden, Trenton State Prison, Trenton, N.J. Writ issued, ret. 7-28-75.		
7-24-75	Filed Govt's. affidavit & notice of motion for an order sequestering jurors during the trial of this matter.		
7-28-75	Deft. Lucas (atty present) Jeffrey C. Hoffman. Pleads not guilty. Case referred to Judge Cooper. Writ satisfied.....Conner,J.		
7-30-75	ANTHONY DeLUTRO-Filed Second Offender Information.		
7-30-75	WILLIAM CHAPMAN-Filed Second Offender Information.		
7-30-75	ROBERTO RIVERA-Filed Second Offender Information.		
7-30-75	ROBERTO RIVERA-Filed Second Offender Information.		
7-30-75	FRANK LUCAS-Filed Second Offender Information.		
7-31-75	Filed MEMO ENDORSED on Govt's. motion filed 7-24-75. Application for sequestration is denied without prejudice to renewal.....Cooper,J. (mailed notice)		
7-25-75	ROBERTO RIVERA-Filed ORDER that the U.S. Marshal for the S.D.N.Y. maintain custody of the deft. in the Southern District pending the completion of the trial of this indictment.....Cooper,J.		
8-1-75	GERARD CACHOIAN-Filed Second Offender Information.		
8-1-75	FRANK LUCAS-Filed OPINION #42898 - Deft's. motion for suppression of evidence is denied.....Cooper,J. (mailed notice)		
8-13-75	FRANK LUCAS-Filed writ of habeas corpus directed to Warden, Trenton State Prison, with marshal"s return. Writ satisfied 7-28-75.....Conner,J.		

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DATE	PROCEEDINGS	Date Order Judgment
8-19-75	ANTHONY SOLDANO-Filed deft's. affidavit & notice of motion for a bill of particulars, discovery & inspection, disclosure & for suppression of evidence, ret. 8-29-75.	
8-25-75	ANTHONY SOLDANO-Filed Govt's. affidavit in opposition to deft's. motion for a bill of particulars & discovery.	
8-21-75	Filed OPINION #42987-Defts'. motions for discovery and for a bill of particulars are granted in part & denied in part. The motions of defts. Magnano and Palatta to strike aliases are denied. Defts'. Magnano, DeLutro & Palatta's motions for severance are denied. Defts'. Lucas, Bolella & Palatta motion for disclosure of agent or informer is denied. Deft. Soldano's motion to dismiss the indictment is denied.....Cooper,J. (mailed notice)	
8-3-75	FRANK LUCAS-Filed Govt's. affidavit for a writ of habeas corpus directed to Warden, Trenton State Prison. Writ issued, ret. 8-19-75.	
8-3-75	ANTHONY SOLDANO-Filed MEMO ENDORSED on deft's. motion for a bill of particulars, discovery & suppression. Motion granted in part & denied in part.....Cooper,J. (mailed notice)	
8-10-75	Filed Govt's. affidavit for a writ of habeas corpus ad test. for John Vasquez directed to Superintendent, N.Y.S. Dept. of Corrections. Writ issued, ret. forthwith	
8-16-75	ANTHONY DeLUTRO-Filed deft's. memorandum of law. (Filed in 75 Cr. 24).	
8-16-75	ANTHONY DeLUTRO-Filed deft's. requests to charge. (Filed in 75 Cr. 24).	
8-18-75	RICHARD BOLELLA-Filed deft's. affirmation & notice of motion for discovery and for a continuance, ret. 8-22-75.	
8-24-75	WILLIAM CHAPMAN-Filed CJA Form 23 - deft's. financial affidavit.	
8-29-75	WILLIAM CHAPMAN-Filed ORDER appointing William Chance, 70 Lafayette St., N.Y.C. 10013 as attorney for deft. in this matter only.....Cooper,J.	
9-30-75	RICHARD BOLELLA-Filed Govt's. affidavit in opposition to deft's. motion for discovery and for a continuance.	
10-1-75	ANTHONY DeLUTRO-Filed ORDER granting custody to the Govt. of sealed Court authorized intercepted wire communications not to be unsealed in the absence of further order of this Court.....Cooper,J.	
10-2-75	RICHARD BOLELLA-Filed MEMO ENDORSED On deft's. motion for discovery filed 8-18-75: The within application has been rendered in its entirety by the Govt's. disclosure in open court on 8-29-75.....Cooper,J.	
10-3-75	Filed Govt's. affidavit & ORDER that John Vasquez be lodged at the Bergen County Jail and transported to and from U.S. Attorney's Office, S.D.N.Y. during the period from 10-3-75 to 10-30-75.....Duffy,J.	
10-3-75	Filed Govt's. affidavit & ORDER that Anthony Montevecchio be lodged at the Bergen County Jail and transported to and from U.S. Attorney's Office, S.D.N.Y. during the period from 10-2-75 to 10-30-75.....Duffy,J.	

DATE	PROCEEDINGS	Date Ord Judgm
9-22-75	Deft. Gerard Carboian withdrew his plea of not guilty & pleads guilty to count 11 only. Govt. consents to dismiss count 1. Pre-sentence report ordered. Probation notified. Sentence - Date Open. Present bail condition continued, ...Cooper,J.	
9-22-75	Jury trial begun as to the following defts. Joseph Magnano, Frank Pallatta, Richard Bolella, Anthony Delutro, Anthony Soldano, John Guyan, William Chapman, Roberto Rivera & Frank Lucas before Cooper,J. (Oath to jurors, voire dire).	
9-24-75	Trial continued. Jury duly empaneled & Sworn.	
9-25-75	Trial continued. Deft. Roberto Rivera withdrew his plea of not guilty (during trial) & pleads guilty to count 1 only. (Count 12 open). Pre-sentence report ordered. Probation notified. (Sentence date open). Deft. remand. in custody of U.S. Marshals.....Cooper,J.	
9-26-75	Trial continued.	
9-29-75	Trial continued.	
9-30-75	Trial continued. Deft. Lucas bail emenerated & deft. remanded.	
10-1-75	Trial continued.	
10-2-75	Trial continued.	
10-3-75	Trial continued.	
10-6-75	Trial continued. Deft. William Chapman moves to emenerate bail. Motion Granted, no opposition by the Govt.	
10-7-75	ROBERTO RIVERA-Filed deft's. petition to enter plea of guilty with Order - guilty plea accepted.....Cooper,J.	
10-7-75	Trial continued.	
10-8-75	Trial continued.	
10-9-75	Trial continued.	
10-10-75	Trial continued.	
10-14-75	Trial continued.	
10-15-75	Trial continued. Govt. rests.	
10-16-75	Trial continued.	
10-17-75	Trial continued.	
10-20-75	Trial continued.	
10-21-75	Trial continued. All defts. rest.	
10-22-75	Trial continued.	
10-23-75	Trial continued.	
10-24-75	Trial continued & concluded. (Special verdict as to all deft's. attached.) Jury Verdict - Deft. Joseph Magnano guilty on counts 1,2,3 & 4. (jury polled) Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Frank Pallatta guilty on counts 1,2,3 & 4 (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Bolella guilty on counts 1 & 4 and jury disagreement on counts 2 & 3. (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Anthony Delutro guilty on counts 1 & 8 (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J. Deft. Anthony Soldano guilty on counts 1 & 9 (jury polled) Pre-sentence report ordered. Probation notified. Deft. Remanded. Sentence 12-3-75 at 10:00 A.M.....Cooper,J. Cont'd. on Page #5	

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DATE	PROCEEDINGS	Date Notes
10-24-75	Jury Verdict - Deft. John Gwynn guilty on counts 1,10 & 16. Jury disagreement on counts 14 & 15. Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. remanded. .....Cooper,J.	
	Deft. William Chapman jury disagreement on count 1 (R.G.R. .....Cooper,J.	
	Deft. Frank Lucas guilty on counts 1,5,6 & 7 (jury polled). Pre-sentence report ordered. Probation notified. Sentence 12-3-75 at 10:00 A.M. Deft. Remanded.....Cooper,J.	
11-12-75	JOSEPH MAGNANO, et al., - Filed Order that Mr. John Bright & Ms. Sonja Johnson be allowed entrance into the Metropolitan Correctional Center during visiting hours from 12:00 noon to 3:30 p.m. & 4:30 p.m. to 6:30 p.m. for the purpose of consulting with the defts. Joseph Magnano, Frank Balatta & Richard Bolella. Cooper J. (Consented by U.S.Atty.) (mailed notice)	
11-20-75	Filed transcript of record of proceedings dated 9-22-75.	
11-25-75	RICHARD BOLLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed defts', affidavit & notice of motion for an evidentiary hearing to determine if a new trial should be granted and for a judgment of acquittal on counts 2 & 3 as to deft. Bolella, ret. 12-3-75.	
11-26-75	ANTHONY DeLUTRO-Filed deft's. affidavit & notice of motion for a new trial and for a judgment of acquittal, ret. 12-3-75.	
12-3-75	JOHN GWYNN-Filed deft's. motion for a judgment of acquittal or alternatively for a new trial.	
12-3-75	JOHN GWYNN-Filed MEMO ENDORSED on deft's. motion filed 12-3-75 Motion denied in all respects.....Cooper,J. (mailed notice)	
12-3-75	Filed Govt's. affidavit in opposition to defts'. post trial motions for a new trial.	
12-3-75	ANTHONY DeLUTRO-Filed MEMO ENDORSED on deft's. motion for a new trial and for a judgment of acquittal, filed 11-26-75. Motion denied in all respects...Cooper,J. (mailed notice)	
12-3-75	RICHARD BOLLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed MEMO ENDORSED on defts', motion for an evidentiary hearing & for a judgment of acquittal, filed 11-25-75. Motion denied in all respects.....Cooper,J. (mailed notice)	
12-5-75	RICHARD BOLELLA-Filed true copy of U.S.C.A. Mandate - Deft's. motion dated 10-28-75 for bail pending sentencing is denied. (mailed notice)	
12-9-75	ROBERTO RIVERA-Filed Govt's. sentencing memorandum.	
12-3-75	RICHARD BOLELLA-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TEN (10) YEARS on each of counts 1 and 4 to run CONSECUTIVELY to each other. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS pursuant to Title 21, U.S. Code, Section 841 to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-9-75.	

	PROCEEDINGS	Date Or Judgment
-3-75	ANTHONY SOLDANO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on each of Counts 1 and 9 to run concurrently with each other. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS, pursuant to Title 21, U.S. Code, Section 841, to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-9-75.	
12-3-75	JOSEPH MAGNANO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on Count 1. FIFTEEN (15) YEARS on Count 2 to run CONSECUTIVELY to sentence imposed on Count 1. FIFTEEN (15) YEARS on Count 3 to run concurrently with sentence on Counts 1 and 2. FIFTEEN (15) YEARS con Count 4 to run concurrently with sentence on Counts 1 and 2. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement, pursuant to (Title 21 Section 841, U.S. Code,)...Cooper,J. Issued commitment 12-10-75.	
12-3-75	FRANK PALLATTA-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FIFTEEN (15) YEARS on Count 1. FIFTEEN (15) YEARS on Count 2 to run CONSECUTIVELY to sentence imposed on Count 1. FIFTEEN (15) YEARS on Count 3 to run concurrently with sentence on Counts 1 and 2. FIFTEEN (15) YEARS on Count 4 to run concurrently with sentence on Counts 1 and 2. The deft. is placed on SPECIAL PAROLE for a period of THREE (3) YEARS to commence upon expiration of confinement, pursuant to (Title 21 Section 841, U.S.Code)....Cooper,J. Issued commitment 12-10-75	
12-3-75	JOHN GWYNN-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS on each of counts 1,10 and 16 to run concurrently with each other. Deft. placed on SPECIAL PAROLE for a period of THREE (3) YEARS, pursuant to Title 21, U.S.Code, Section 841, to commence upon expiration of confinement. The sentence imposed herein is to run concurrently with the state probation violation.....Cooper,J. Issued commitment 12-10-75.	
12-3-75	ANTHONY DeLUTRO-Filed JUDGMENT & COMMITMENT (atty present) The deft. is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWENTY-FIVE (25) YEARS on each of Counts 1 and 8 to run concurrently with each other. The deft. is placed on SPECIAL PAROLE for a period of SIX (6) YEARS, pursuant to Title 21, U.S. Code, Section 841, to commence upon expiration of confinement.....Cooper,J. Issued commitment 12-10-75.	
12-10-75	ANTHONY DeLUTRO-Filed deft's. affidavit & notice of motion for reduction of sentence.	
12-10-75	ANTHONY DeLUTRO-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. (Mailed copies to Anthony DeLutro, M.C.C., 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office).	
12-12-75	ANTHONY SOLDANO-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. Mailed copies to Anthony Soldano, 150 Park Row, N.Y.C.10007 and U.S. Attorney's Office.	

Cont'd. on Page 97

	PROCEEDINGS	Date Order Judgment
-75	RICHARD BOLELLA, FRANK PALATTA & JOSEPH MAGNANO-Filed Defts', notice of appeal from the judgments of conviction entered on 12-3-75. Mailed copies to Defts. at 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office.	
12-15-75	ANTHONY DeLUTRO-Filed Govt's. affidavit in opposition to deft's. motion for reduction of sentence.	
12-16-75	JOHN GWYNN-Filed deft's. notice of appeal from the judgment of conviction entered on 12-3-75. Copies mailed to John Gwynn, 150 Park Row, N.Y.C. 10007 and U.S. Attorney's Office.	
12-19-75	ANTHONY BOLDANO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	RICHARD BOLELLA-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	JOHN GWYNN-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	ANTHONY DeLUTRO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	FRANK PALLATTA-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-19-75	JOSEPH MAGNANO-Filed commitment & entered return. Deft. delivered to Warden, M.C.C., N.Y.C. on 12-3-75.	
12-29-75	RICHARD BOLLELLA-Filed Deft's. affidavit & notice of motion for bail pending appeal.	
12-29-75	JOSEPH MAGNANO & FRANK PALATTA-Filed Defts', affidavit & notice of motion for bail pending appeal.	
01-07-76	JOSEPH MAGNANO, FRANK PALLATTA, RICHARD BOLELLA & ANTHONY DeLUTRO-Filed ORDER that Defts', motion for a new trial based on newly discovered evidence is denied.....Cooper,J. (mailed notice)	

12-29-75	JOSEPH MAGNANO & FRANK PALATTA-Filed Defts', affidavit & notice of motion for bail pending appeal.
01-1-76	[illegible] Filed Defts' affidavit in [illegible] pending appeal.
01-14-76	JOSEPH MAGNANO, ET AL.-Filed ORDER #40787 - Defts', [illegible] Denied in all respects...Cooper,J.
01-20-76	JOSEPH MAGNANO-Filed Defts' affidavit & notice of motion to recuse the Court from [illegible]
01-21-76	JOSEPH MAGNANO-Filed JUDGMENT (1 copy entered) The defts. is hereby [illegible] to the custody of the Attorney General or his authorized representative for imprisonment for a period of fifteen (15) years on Count 1, and to follow [illegible] all other sentences heretofore imposed, defts. placed on Special Parole [illegible] period of six (6) years, pursuant to Title 21, U.S. Code Section 841, to [illegible] upon release. Count 10 is dismissed on motion of [illegible] Entered pursuant to Rule 32(a) F.R.Cr.P. Cooper,J. Certified copy of Judgment & Commitment 1-13-76.
01-21-76	JOSEPH MAGNANO-Filed ORDER that defts. be released on [illegible] bail pending appeal, herein, upon the execution of an appearance bond in the amount of $50,000 each, to be signed by defts. and [illegible] Cooper,J.
01-21-76	JOSEPH MAGNANO-Filed Defts' Notice of Appeal from the final judgment entered herein on January 13, 1976. Copy to Frank Lucas, U.S.Atty.
01-22-76	JOSEPH MAGNANO-Filed Defts' affidavit in opposition to Govt's. motion to recuse the Court from [illegible] Defts.
01-22-76	JOSEPH MAGNANO-Filed ORDER on Defts' motion to recuse the Court. Motion [illegible] Cooper,J. (mailed original)
	[illegible] Filed Marshal's Return that the [illegible] Defendants of apprehension [illegible] Frank Lucas, U.S.Atty. 110 Park Row.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALATTA, RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUPARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", CARMINE MARGIASSO a/k/a "Charlie", ANTHONY DeLUTRO a/k/a "Tony West", ANTHONY VISCONTI, JOSEPH MALIZIA a/k/a "Patsy Pontiac", ERNEST MALIZIA, FRANK CARAVELLA, JOHN GWYNN, WILLIAM CHAPMAN a/k/a "Chappy", ST JULIAN HARRISON, FRANK LUCAS, GERARD CACHOIAN a/k/a "Coco", and ROBERTO RIVERA,

Defendants.

INDICTMENT

75 Cr. 24

The Grand Jury charges:

From on or about the 1st day of January, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALATTA, RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUPARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", CARMINE MARGIASSO a/k/a "Charlie", ANTHONY DeLUTRO a/k/a "Tony West", ANTHONY VISCONTI, JOSEPH MALIZIA a/k/a "Patsy Pontiac", ERNEST MALIZIA, JOHN GWYNN, WILLIAM CHAPMAN a/k/a "Chappy", ST JULIAN HARRISON, FRANK LUCAS, GERARD CACHOIAN a/k/a "Coco", and ROBERTO RIVERA, the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, James Curhane, Mario Perna, and Anthony Verzino, named herein as co-conspirators but not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and agree together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

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2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about February 1973 defendant ERNEST MALIZIA met co-conspirator Mario Perna at the Evergreen Bar at 4905 Fifth Ave., Brooklyn, New York and had a conversation.

2. In or about February 1973 defendants ERNEST MALIZIA and FRANK PALATTA met in the Bronx, New York and rode in an automobile.

3. In or about March 1973 defendant FRANK PALATTA met defendant ERNEST MALIZIA and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York and discussed narcotics.

4. In or about March 1973 defendant FRANK FERRARO a/k/a "Skooch" delivered a package containing approximately 2 kilograms of heroin to defendant ERNEST MALIZIA and co-conspirator Mario Perna on Allerton Avenue, Bronx, New York.

5. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-quarter kilogram of heroin to defendant JOHN GWYNN.

6. In or about March, 1973 defendant WILLIAM CHAPMAN a/k/a "Chappy" introduced co-conspirator Mario Perna and defendant ERNEST MALIZIA to defendant ST. JULIAN HARRISON.

7. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid approximately $20,000 to defendants DOMINIC TUFARO a/k/a "Donnie Boy", FRANK PALATTA and FRANK FERRARO a/k/a "Skooch".

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8. In or about March, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA received a package containing approximately 4 kilograms of heroin from FRANK FERRARO a/k/a "Skooch".

9. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately 3 kilograms of heroin to defendant ST JULIAN HARRISON.

10. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid defendants JOSEPH MAGNANO a/k/a "Joe the Grind", DOMINIC TUPARO a/k/a "Donnie Boy", FRANK PALATTA and FRANK FERRARO a/k/a "Skooch" approximately $20,000.

11. In or about April, 1973 defendant FRANK LUCAS paid co-conspirator Mario Perna and defendant ERNEST MALIZIA approximately $56,000.

12. In or about April, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-eighth kilogram of heroin to defendant GERARD CACHOIAN a/k/a "Coco".

13. In or about September, 1973 co-conspirators Mario Perna and Anthony Verzino and defendant ERNEST MALIZIA met and had a conversation.

14. In or about September, 1973 defendant GERARD CACHOIAN a/k/a "Coco" introduced defendant ROBERTO RIVERA to co-conspirator Mario Perna and defendant ERNEST MALIZIA.

15. In or about September, 1973 co-conspirator Mario Perna delivered a package containing approximately two kilograms of heroin to defendant ROBERTO RIVERA at the Pathmark Shopping Center near Bruckner Boulevard and White Plains Road, Bronx, New York.

16. In or about October, 1973 defendant RICHARD BOLELLA met co-conspirator Mario Perna and had a discussion about reducing the price being paid for the heroin.

17. In or about November 1973 defendants FRANK MIRRARO a/k/a "Skooch" and CARMINE MARCIASSO a/k/a "Charlie" delivered a package containing approximately 12 kilograms of heroin to co-conspirator Mario Perna at the Cross County Shopping Center, Yonkers, New York.

18. In or about November, 1973 defendant ANTHONY DeLUTRO a/k/a "Tony West" delivered a package containing approximately 5 kilograms of heroin to co-conspirator Anthony Verzino.

19. On or about December 1st, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA delivered a package containing approximately 10 kilograms of heroin to defendant FRANK LUCAS at the Van Cortlandt Motel, Bronx, New York.

20. In or about November, 1973 co-conspirator Anthony Verzino paid defendant ANTHONY DeLUTRO a/k/a "Tony West" approximately $250,000 in two installments.

21. In or about January 1974 defendant ANTHONY VISCONTI delivered a package containing approximately 3 kilograms of heroin to co-conspirator Anthony Verzino in Queens, New York.

22. On or about February 15, 1974 co-conspirators Frank Caravella and Anthony Verzino possessed approximately 26 pounds of heroin at 1130 Pelham Parkway, Bronx, New York.

(Title 21, United States Code, Section 846.)

SECOND COUNT

The Grand Jury further charges:

In or about March 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALATTA, RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUPARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 2 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALATTA, RICHARD BOLLELA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUPARO a/k/a "Donnie Boy" FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 4 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

FOURTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALATTA, RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Hooch" and CARMINE MARCIANO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 12 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, ST. JULIAN HARRISON and FRANK LUCAS the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

SIXTH COUNT

The Grand Jury further charges:

In or about October, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute Schedule I and II narcotic drug controlled substances, to wit, approximately 4 kilograms of heroin and 2 kilograms of cocaine.

(Title 21, United States Code Sections 812, 841(a)(1) and 841(b)(1)(A))

SEVENTH COUNT

The Grand Jury further charges:

On or about the 1st day of December, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 10 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

EIGHTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, ANTHONY DeLUTRO a/k/a "Tony West", the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 5 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

NINTH COUNT

The Grand Jury further charges:

In or about January, 1974 in the Southern District of New York, defendants ANTHONY VISCONTI and JOSEPH MALIZIA a/k/a "Patsy Pontiac" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) Title 18, United States Code, Section 2.)

TENTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOHNNY GWYNN the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

ELEVENTH COUNT

The Grand Jury further charges:

In or about April, 1973 in the Southern District of New York, GERARD CACHOIAN a/k/a "Coco" the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

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TWELFTH COUNT

The Grand Jury further charges:

In or about September, 1973 in the Southern District of New York, ROBERTO RIVERA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841 (b)(1)(A).)

THIRTEENTH COUNT

The Grand Jury further charges:

In or about December 1973 in the Southern District of New York FRANK CARAVELLA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(1)(A).)

FOREMAN

PAUL J. CURRAN
United States Attorney

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DA:ko

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

-v-

JOSEPH MAGNANO, a/k/a "Joe the Grind",
FRANK PALLATTA, a/k/a "Bolot", and a/k/a "Nose",
RICHARD BOLELLA,
LOUIS MACCHIAROLA, a/k/a "Red Hot",
MICHAEL CARBONE,
DOMINIC TUFARO, a/k/a "Donnie Boy",
FRANK FERRARO, a/k/a "Skooch",
CARMINE MARGIASSO, a/k/a "Charlie",
ANTHONY DeLUTRO, a/k/a "Tony West",
ANTHONY SOLDANO, a/k/a "Tony",
JOSEPH MALIZIA, a/k/a "Patsy Pontiac",
ERNEST MALIZIA,
FRANK CARAVELLA,
JOHN GWYNN,
WILLIAM CHAPMAN, a/k/a "Chappy",
ST. JULIAN HARRISON,
FRANK LUCAS,
GERARD CACHOIAN, a/k/a "Coco",
ROBERTO RIVERA, and
GABRIEL RODRIGUEZ, a/k/a "Cass",
a/k/a "Cassanova",

Defendants.

INDICTMENT

S 75 Cr. 687

The Grand Jury charges:

From on or about the 1st day of January, 1973 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA a/k/a "Bolot", a/k/a "Nose", FIRHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", CARMINE MARGIASSO a/k/a "Charlie", ANTHONY DeLUTRO a/k/a "Tony West", ANTHONY SOLDANO a/k/a "Tony", JOSEPH MALIZIA a/k/a "Patsy Pontiac", ERNEST MALIZIA, JOHN GWYNN, WILLIAM CHAPMAN a/k/a "Chappy", ST. JULIAN HARRISON, FRANK LUCAS, GERARD CACHOIAN a/k/a "Coco", ROBERTO RIVERA, and GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova", the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, Mario Perna, and Anthony Verzino, named herein as co-conspirators but not as defendants, and others to the Grand Jury known and unknown, unlawfully, wilfully and knowingly combined, conspired, confederated and

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agree together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants unlawfully, wilfully and knowingly would distribute and possess with intent to distribute Schedule I and II narcotic drug controlled substances the exact amount thereof being to the Grand Jury unknown in violation of Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

OVERT ACTS

In pursuance of the conspiracy and to effect the objects thereof the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about February 1973 defendant ERNEST MALIZIA met co-conspirator Mario Perna at the Evergreen Bar at 4905 Fifth Ave., Brooklyn, New York and had a conversation.

2. In or about February 1973 defendants ERNEST MALIZIA and FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", met in the Bronx, New York and rode in an automobile.

3. In or about March 1973 defendant FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", met defendant ERNEST MALIZIA and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York and discussed narcotics.

4. In or about March 1973 defendant FRANK FERRARO a/k/a "Skooch" delivered a package containing approximately 2 kilograms of heroin to defendant ERNEST MALIZIA and co-conspirator Mario Perna on Allerton Avenue, Bronx, New York.

5. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-quarter kilogram of heroin to defendant JOHN GWYNN.

6. In or about March, 1973 defendant WILLIAM CHAPMAN a/k/a "Chappy" introduced co-conspirator Mario Perna and defendant ERNEST MALIZIA to defendant ST. JULIAN HARRISON

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7. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid approximately $20,000 to defendants DOMINIC TUFARO a/k/a "Donnie Boy", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", and FRANK FERRARO a/k/a "Skooch".

8. In or about March, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA received a package containing approximately 4 kilograms of heroin from FRANK FERRARO a/k/a "Skooch".

9. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately 3 kilograms of heroin to defendant ST. JULIAN HARRISON.

10. In or about March, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna paid defendants JOSEPH MAGNANO a/k/a "Joe the Grind", DOMINIC TUFARO a/k/a "Donnie Boy", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", and FRANK FERRARO a/k/a "Skooch" approximately $20,000.

11. In or about April 1973 defendant FRANK LUCAS paid co-conspirator Mario Perna and defendant ERNEST MALIZIA approximately $56,000.

12. In or about April, 1973 defendant ERNEST MALIZIA and co-conspirator Mario Perna delivered a package containing approximately one-eighth kilogram of heroin to defendant GERARD CACHOIAN a/k/a "Coco".

13. In or about September, 1973 co-conspirators Mario Perna and Anthony Verzino and defendant ERNEST MALIZIA met and had a conversation.

14. In or about September, 1973 defendant GERARD CACHOIAN a/k/a "Coco" introduced defendant ROBERTO RIVERA to co-conspirator Mario Perna and defendant ERNEST MALIZIA.

15. In or about September, 1973 co-conspirator Mario Perna delivered a package containing approximately two kilograms of heroin to defendant ROBERTO RIVERA at the Pathmark Shopping Center near Bruckner Boulevard and White Plains Road, Bronx, New York.

16. In or about October, 1973 defendant RICHARD BOLELLA met co-conspirator Mario Perna and had a discussion about reducing the price being paid for the heroin.

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17. In or about November 1973 defendants FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" delivered a package containing approximately 12 kilograms of heroin to co-conspirator Mario Perna at the Cross County Shopping Center, Yonkers, New York.

18. In or about November, 1973 defendant ANTHONY DeLUTRO a/k/a "Tony West" delivered a package containing approximately 5 kilograms of heroin to co-conspirator Anthony Verzino.

19. On or about December 1st, 1973 co-conspirator Mario Perna and defendant ERNEST MALIZIA delivered a package containing approximately 10 kilograms of heroin to defendant FRANK LUCAS at the Van Cortlandt Motel, Bronx, New York.

20. In or about November, 1973 co-conspirator Anthony Verzino paid defendant ANTHONY DeLUTRO a/k/a "Tony West" approximately $250,000 in two installments.

21. In or about January 1974 defendant ANTHONY SOLDANO a/k/a "Tony", delivered a package containing approximately 3 kilograms of heroin to co-conspirator Anthony Verzino in Queens, New York.

22. On or about January 15, 1974, defendant JOHN GWYNN distributed approximately 148.5 grams of heroin in or near Apartment 5C, 1065 Jerome Avenue, Bronx, New York.

23. On or about February 25, 1974 co-conspirators Frank Caravella and Anthony Verzino possessed approximately 26 pounds of heroin at 1130 Pelham Parkway, Bronx, New York.

24. On or about January 28, 1975, the defendant FRANK LUCAS possessed approximately $584,705 in cash at 933 Sheffield Road, Teaneck, New Jersey.

(Title 21 United States Code, Section 846.)

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SECOND COUNT

The Grand Jury further charges:

In or about March 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch", and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 2 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

THIRD COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BOLLELA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy" FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 4 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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FOURTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, JOSEPH MAGNANO a/k/a "Joe the Grind", FRANK PALLATTA, a/k/a "Bolot", a/k/a "Nose", RICHARD BOLELLA, LOUIS MACCHIAROLA a/k/a "Red Hot", MICHAEL CARBONE, DOMINIC TUFARO a/k/a "Donnie Boy", FRANK FERRARO a/k/a "Skooch" and CARMINE MARGIASSO a/k/a "Charlie" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 12 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

FIFTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, ST. JULIAN HARRISON and FRANK LUCAS the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) and Title 18, United States Code, Section 2.)

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SIXTH COUNT

The Grand Jury further charges:

In or about October, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute Schedule I and II narcotic drug controlled substances, to wit, approximately 4 kilograms of heroin and 2 kilograms of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A)

SEVENTH COUNT

The Grand Jury further charges:

On or about the 1st day of December, 1973 in the Southern District of New York, FRANK LUCAS the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 10 kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).

EIGHTH COUNT

The Grand Jury further charges:

In or about November, 1973 in the Southern District of New York, ANTHONY DeLUTRO a/k/a "Tony West", the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 5 kilograms of heroin

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).)

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NINTH COUNT

The Grand Jury further charges:

In or about January, 1974 in the Southern District of New York, defendants ANTHONY SOLDANO a/k/a "Tony", and JOSEPH MALIZIA a/k/a "Patsy Pontiac" the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A) Title 18, United States Code, Section 2.)

TENTH COUNT

The Grand Jury further charges:

In or about March, 1973 in the Southern District of New York, JOHNNY GWYNN the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

ELEVENTH COUNT

The Grand Jury further charges:

In or about April, 1973 in the Southern District of New York, GERARD CACHOIAN a/k/a "Coco" the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately one-eighth kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

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TWELFTH COUNT

The Grand Jury further charges:

In or about September, 1973 in the Southern District of New York, ROBERTO RIVERA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately two kilograms of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

THIRTEENTH COUNT

The Grand Jury further charges:

In or about December 1973 in the Southern District of New York FRANK CARAVELLA the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance to wit, approximately one-half kilogram of heroin.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A).)

FOURTEENTH COUNT

The Grand Jury further charges:

On or about October 30, 1973, in the Southern District of New York, the defendant, JOHN GWYNN, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, 159.5 grams of cocaine.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A); Title 18 United States Code, Section 2.)

FIFTEENTH COUNT

The Grand Jury further charges:

On or about the 20th day of December, 1973, in the Southern District of New York JOHN GWYNN, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule II narcotic drug controlled substance, to wit, 151.5 grams of cocaine.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

SIXTEENTH COUNT

The Grand Jury further charges:

On or about the 15th day of January, 1974 in the Southern District of New York, JOHN GWYNN, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, 148.5 grams of heroin.

(Title 21, United States Code, Section 812 841(a)(1) and 841(b)(1)(A); Title 18, United States Code, Section 2.)

SEVENTEENTH COUNT

The Grand Jury further charges:

In or about March 1971, in the Southern District of New York, GABRIEL RODRIGUEZ, a/k/a "Cass", a/k/a "Cassanova", the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 1/8 kilogram of heroin.

(Title 21, United States Code, Sections 812 841(a)(1) and 841(b)(1)(A).

Foreman

PAUL J. CURRAN
United States Attorney

Let's go ahead.

Q Mr. Perna, will you relate the conversation that you and Malizia had with Mr. Lucas with respect to Albert Rossi?

A Yes, sir. We met with Mr. Lucas in order that he was -- in the event that he was supposed to give us some money and we asked him for it at that time. He then told us that he had run into a problem, that he had made a deal with a fellow by the name of Al Rossi to secure some cocaine. He had given the fellow $60,000 in advance for the cocaine and that he had never gotten the cocaine and he was having trouble locating the fellow, Al Rossi.

He then asked me and Malizia, if we would help him, if we knew these people and would we help him to locate him and get back his $60.000.

I then told Lucas, "What are the other names involved here? I don't know any Al Rossi. Do you know anybody else involved?"

He said, "There are some other names involved, but I don't know them at this time."

Lucas then said that he would find out the other names and get back to us provided we were willing to help him. We told him we would help him if we were familiar with the name. He didn't know Al Rossi.

MR. HOFFMAN: May we have a side bar at this

time, your Honor, to explain our objection?

THE COURT: Yes. We will take a short recess and excuse the jury, and I'll take up what you have in mind right now.

MR. HOFFMAN: Thank you.

(In the absence of the jury.)

THE COURT: All right, will you take your seats.

Counsel, now go ahead. What is on your mind?

MR. EPSTEIN: Your Honor, briefly it is this:

Albert Rossi, I understand, has been a government witness in several cases, one of which I have personal knowledge of, United States vs. Ernest Caluzzo. In that case Rossi testified concerning alleged dealings with Frank Lucas. The dealings didn't involve heroin or cocaine. The dealings involved a rip-off. He went to Lucas, made an offer that he never intended to fulfil. He took a sum of money. The money was ultimately returned.

The activity of Rossi in no way has any bearing inthis case. Albert Rossi is not named in the indictment. He is named in a letter in which the government now includes him as a co-conspirator. But there's no heroin or cocaine that changed hands involving him and he and his partner never intended to go through any deal with Lucas.

I object to this evidence. It is not relevant to the issues before the Court.

THE COURT: What you're saying is that the government knows that and yet the government is allowed before me, in an entirely different case, to pursue it.

The government knows it's empty, and you say the government shouldn't therefore go forward on that phase? Is that the essence of what you're advancing?

MR. EPSTEIN: In essence, yes. Your Honor has heard Mr. Perna's testimony, in which he indicated that as he knows there was a rip-off. Lucas lost money and wanted his money back.

THE COURT: Are you through?

MR. EPSTEIN: Yes, sir.

THE COURT: All right. Mr. Hoffman?

MR. HOFFMAN: In addition to what Mr. Epstein said, point one, the other point is not only what was said, but the fact that even if there had been a deal with Mr. Rossi, which in fact there wasn't, but even if there had been, there would be something told by Mr. Lucas to people that he was involved in allegedly in a conspiracy as trying to be proved by the government here. If he dealt with six other people in six different conspiracies, that not only has nothing to do with this conspiracy, but is bringing

in other crimes committed, alleged to have been committed before this jury and that's why at this point I stopped and asked to argue this outside the hearing of this jury.

That would be the second posture that I have your Honor.

THE COURT: Are you through?

MR.HOFFMAN: Yes, sir.

THE COURT: Mr. Amorosa.

MR. AMOROSA: With respect to other crimes, we intend to show that, to show Mr. Lucas' knowledge and a pattern of conduct. It's all permissible under the rules.

What we are showing here is background concerning the defendant Lucas, his knowledge, his willingness to participate in a conspiracy concerning narcotics, et cetera. It is that simple. There's no question it goes to a different conspiracy.

Incidentally, Mr. Rossi is not named as a co-conspirator in this indictment and he never was named as a co-conspirator in this indictment. This goes to a relationship that Mr. Lucas had with Mr. Rossi, which is coming from Mr. Lucas' own lips. It is an admission against his own interests in this relationship. That's all I have to say with respect to it, your Honor. It is totally relevant.

In United States against Tramunti, there was [illegible] testimony with respect to prior bad acts of the defendants, acts that they engaged in, criminal conduct that they engaged in, all going to prove their participation in the conspiracies charged, and their knowledge of it.

MR. HOFFMAN: If I may, your Honor, in view of that response, that the government agrees and admits that this has nothing to do with this conspiracy, that it was a separate crime that they are alleging was entered into, and that if they are putting it before the jury knowing that, I respectfully disagree with their posture and ask the Court to declare a mistrial.

As I understand the law, either in the Tramunti case or in any other case, yes, if an individual takes the stand and is cross examined with respect to prior bad acts or crimes, that's another situation. But I know of no law wither of old or recent vintage that allows a prosecutor to put into evidence, as the prosecutor states he did right here, other crimes committed by a defendant or alleged to have been committed other than those for which he is on trial. I think that's about as basic as any proposition of law, and I would ask the Court to declare a mistrial based on that.

THE COURT: Mr. Panzer?

MR. E. PAIZER: Your Honor, I have an additional argument which goes to the other defendants. This is not a conversation in furtherance of the conspiracy that's on trial. If he is trying to show any similar acts or intent by a specific person it is not binding on these defendants, because it wasn't said in furtherance of the conspiracy and I think at the least we are entitled to a limiting instruction.

MR. AMOROSA: I think they are right with respect to that. I think they are entitled to a limiting instruction, but I think this testimony is totally admissible in this trial, and as your Honor knows, we intend to prove certain prior acts, similar prior acts on the part of the defendants Bolella, Pallatta and a defendant who is not on trial here, Macchiarola.

We submitted a letter with respect to that in which we submit that in narcotics cases evidence of prior similar acts is relevant, but we do say your Honor should instruct the jury just briefly that the testimony that came in with respect to Rossi should be considered by them with respect to the defendant Lucas only and with respect to the defendant Lucas' knowledge and his intent in the conspiracy charge.

MR. GOLDBERG: If your Honor please, you will

recall that prior to the trial I red-flagged this issue, namely, correspondence received from Mr. Amorosa and my lett to the Court citing your Honor s authority as to whether there should be proof with respect to prior similar acts and you reserved decision on that and you alerted the prosecutor to point out those areas where he was about to embark on an area that you hadn't yet ruled on and you hadn't heard argument on, and it surprises me that the prosecutor plowed ahead on this without first giving your Honor or counsel a chance to be heard in support of their position that under th facts of this case there ought be no proof of prior similar acts.

The cases are clear that before there can be proof of prior similar acts the government must show a particularized need.

Now, in light of the testimony here from Mr. Perna, I suggest that there is no particularized need to go into this area, raising, as it does, the terrible likelihood of prejudice and the inability of the jury to follow as articulate as your Honor is, a limited instruction that will tell them that they are not to consider this to the extent that they are trying to prove that Mr. Lucas is a bad man -- propensity.

We all know that the terrible danger to this

group is that the jury, despite your Honor's or any other Court's instructions will consider this case on the question of propensity.

The cases are clear that there ought to be a particularized need.

I submit from all the testimony of Perna in which he details face to face transactions, tremendous quantities of money relating to heroin, devastating kind of testimony, there is no particularized need to have to resort to this terribly prejudicial material, which involves not only prejudice to Lucas, but the question of spill-over to the other defendants and I am surprised that it was plowed straight through in light of your Honor's admonition that when we get to these touchy areas we ought to be alerted.

THE COURT: What do you have to say, Mr. Amorosa?

MR. AMOROSA: Very little, your Honor, except that Mr. Goldberg's argument has been rejected time and time again by the Second Circuit Court. Permitting the Court below in its discretion to include prior similar acts in narcotics cases as well as other cases.

In view of Mr. Goldberg's statement that I should have alerted the Court, I apologize. I should have alerted the Court that there may have been a question here with

regard to prior similar acts of Lucas. It was so tangential to our proof and so opposed to prior and concurrent similar acts, that I didn't bring it to your Honor's attention.

THE COURT: How much more have you got on --

MR. AMOROSA: Your Honor, I'll be finished in a minute --

THE COURT: Will you let the Judge finish, and have the record show what he said, whether it worth showing or not?

How much have you got on this phase?

MR. AMOROSA: Just a little, your Honor.

THE COURT: In other words, you are through with the Rossi bit?

MR. AMOROSA: Just about.

MR. J. PANZER: Your Honor, may I be heard?

Notwithstanding the abject apology from the United States Attorney, I feel the damage has been done. This jury, no matter how intelligent they may be -- and we have had cases on that -- cannot separate the wheat from the chaff. This is all coming in at once. I feel that the minds of the jury may now have been influenced in such a fashion that later on, two or three weeks from today, they will not remember any limiting instruction, because testimony here is so divers and so complicated that a

limiting instruction here while given in view of the fact that this transgression has occurred, I think will not be enough. The damage has been done and so I join in the motion for a mistrial.

MR. GOLDBERG: Judge, would it help you? I have a copy of the Goodwin case opinion --

THE COURT: What makes you think we haven't informed ourselves of it? You know that the moment somebody sends us something we are on top of it. We do our homework, sir, and that is the reason I am impatient when a lawyer doesn't do it and that's the reason I'm going to tell Mr. Amorosa that if he dares violate the Court's instructions with regard to an issue, I will declare a mistrial. When I say take it up with me before you open your mouth, I mean that, and if he dares do it again, I will throw out this case.

He can't just say "I apologize" or "I forgot" or something.

You had no right to go into this without first clearing it with me, and don't ever do that again with regard to anything that I have said, must be sounded out first, Mr. Amorosa. Do you understand that?

MR. AMOROSA: I understand that, Judge, but I would like to express our position again on the record at

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this time.

First, we aren't even certain that this is a prior or concurrent similar act. There's no question it would go to the intent of the defendant Lucas.

THE COURT: What did you apologize for a few minutes ago? For what?

MR. AMOROSA: It did express that Mr. Lucas may have been in another conspiracy at the time to do business with this fellow Albert Rossi.

THE COURT: So?

MR. AMOROSA: And because of that, and I was aware of the fact -- I admit that -- that in view of your Honor's failure to rule on prior similar acts, I apologized. But it is not a defendant on trial. It goes certainly to Mr. Lucas' intent and would be subject to a limiting instruction.

THE COURT: The moment you had the slightest indication that possibly this might run into what the Judge reserved decision on then you should not even have touched it until you had the Judge pass on it. I am just warning you not to do it again. What is the purpose of all of this? I want to give the lawyers a chance to tell me why I shouldn't go into it. I don't want it first to be done and the damage then take place and then try to erase it.

So there are certain matters that must be dealt with first in order to avoid trouble, and I'm sure you didn't do it purposely, but I'm warning you not to do it again.

This may come as a sad ruling by the Court, but I am ruling that no damage was done, that what has been done up to this point is, pursuant to my understanding, perfectly in accordance with law. I do, however, emphasize that it should have been taken up first, and be careful not to venture into areas that I have already expressed some doubt about and that should be resolved before those areas are brought to the attention of the jury.

I intend, however, to give the jury a limiting instruction, and now that the Court has ruled and by that ruling denied your motions for a mistrial -- I want the help of my colleagues at the bar before me as to what that limiting instruction should be.

Do you want me to tell the jury in essence that what has been said with regard to the testimony dealing with Rossi is to be limited to the defendant Lucas and cannot and must not be connected in any way, directly or indirectly with the other defendants on trial? They had no part of it and they shouldn't be burdened with it. That's the law.

Does that statement satisfy the government?

MR. AMOROSA: Yes, your Honor.

THE COURT: Does that statement satisfy the defense?

MR. GOLDBERG: yes.

MR. HOFFMAN: Your Honor, I ask that the Court have that testimony stricken and direct the jury not to consider it, as it is not evidence of anything charged in this case, or in the alternative that if the Court doesn't rule in favor of that suggestion, that it is plain just not evidence of the commission of the crimes charged in this case.

MR. J. PANZER: Your Honor has offered to make a statement on limiting instruction to this jury and I think it's a right move. It doesn't satisfy the defendant DeLutro for this reason: The defendant Lucas' participation or alleged participation in this conspiracy, as brought out by the evidence adduced by Perna, is so involved that I feel that even though your Honor gives a limiting instruction, the government will try to tie in the defendant DeLutro with this entire conspiracy, and even though your Honor wants to give a fair statement, limiting statement, it doesn't satisfy me as attorney for the defendant DeLutro, I feel that the defendant DeLutro cannot receive a fair trial, and I object to any limiting instruction and I ask for a mistrial as to the defendant DeLutro.

THE COURT: Very well. Of course, gentlemen, you know, that that additional motion made now by Mr. Panzer enures to the benefit of every defendant similarly situated and I deny the motion again and I intend to do what I have indicated.

I think after you arduous labors and the spirit which you have demonstrated -- I know it is tiring, and we will take a little recess before we go on with the trial.

Ten minutes, gentlemen, and don't let me go running around for you. Be back in ten minutes.

Wait a minute, Mr. Amorosa -- gentlemen, let me ask you one thing.

When the Judge is saying something, you don't get up until I get up. There's a lot of noise here. The accoustics are miserable.

Mr. Amorosa has raised his hand. I don't know what he has on his mind.

MR. AMOROSA: Judge, is it possible for us to get a ruling now on the prior similar acts that we set out in our letter? There will be additional testimony against these defendants as to what they did prior to this conspiracy That will come from the witness Perna. We intend to go into that, so I think we ought to have a ruling now. When we get to that point we will have to have a side bar. In the

argument we are talking about a conspiracy in 1960 and 1965 and the conspiracy charged here is 1973.

THE COURT: If you would be more particular, I would understand your point. What is it that you intend to bring out through Perna on what you call these prior involvements with other crimes? Just what is it? It's too uncertain to me.

MR. AMOROSA: In conversations with the defendant on trial, when Pallatta and Magnano --

THE COURT: In the course of business of which they talked about what?

MR. AMOROSA: Their dealings in other instances. We want to have that testimony introduced and brought out in the record. I'm afraid that someone may think here that the testimony is inadmissible because the conspiracy charged here begins in 1973. It will antedate 1973; the grand jury thought it began in 1973 at the time of the indictment.

First, we are permitted to get it in even if it goes prior to 1973, and secondly, we would have an authority that the grand jury's statement as to the beginning of the conspiracy was wrong, but what we are asking your Honor in substance is to permit Perna's testimony --

THE COURT: Please, gentlemen.

MR. AMOROSA: -- admit Perna's testimony that these same people, the defendants on trial, had been participating in conspiracies to distribute narcotics and it is probably the same conspiracy going back many years, which occurred prior to 1973.

THE COURT: And that the conspiracy comprised within the four corners of the indictment now before us is a continuing conspiracy. Is that what you're saying?

MR. AMOROSA: I'm not saying that exactly, your Honor.

THE COURT: What are you saying?

MR. AMOROSA: Let's take the prior similar acts. Assume for the moment that if these people engaged in narcotics transactions prior to 1973, that they will be considered as prior similar acts. We ask that those prior similar acts be introduced into the record through the testimony of Perna, that is, if Pallatta or Magnano or Bolella told Perna that they had been in business for fifteen or twenty years and they were moving tons of heroin --

THE COURT: You will contend that it is binding on those and not the other defendants?

MR. AMOROSA: Yes, sir. We will agree to a limiting instruction on that.

THE COURT: Is there any difference between what you now advance and what I am about to say to the jury with regard to Perna's testimony on Rossi and Lucas?

MR. AMOROSA: No, sir. There's no difference, because I am assuing that those prior activities were prior similar acts. The government could have another argument on this side, and that argument would be that this is a continuing criminal enterprise or conspiracy, going back many years, that the grand jury just caught these people at this time, and they indicted them for this period, but goes back many, many years, so the jury in that case would have to be told that they were prior similar acts.

What we suggest the Court do is to charge the jury as to prior similar acts on all occasions; not only this witness will testify as to prior similar acts, but a government witness, Verzino, will testify that he was engaged in conspiratorial work to sell narcotics with these defendant going back sometime to 1960, and I don't want to be held to any dates at this point, or anything I say to contradict or impeach Mr. Verzino. So it is not only this witness. It is Verzino also, and we will have another witness and I will tell you who that witness is, on the record, because we have been told that his family is now secured, so we have no problem with respect to the prior similar act witness about

whose testimony I have written a letter to your Honor. His name is Anthony Manfridonia. That takes care of that.

We havenow revealed the man's name. We have particularized the information that he will be testifying to as best we could.

MR. GOLDBERG: Your Honor, Mr. Amorosa has now raised the matter bringing this to a head finally. Would your Honor be willing to hear argument to amplify what I put in my two-page letter, because I think for purpose of the record, wherever this may go, I want my position to be crystal clear with respect to what I consider to be a devastating piece of evidence, wholly unwarranted by the rules of evidence.

THE COURT: Will you suffer an interruption? Certainly I will hear all of you, and I wonder if the better part of wisdom wouldn't dictate this.

We told the jury to be here at 9. We got started at 9:10 because one of the jurors was a little late. I would like to do as much as we can between now and 1 o'clock. I see no reason why we can't skirt around this problem for this morning's testimony and let's have, if I can get counsel this afternoon, I'm ready, when we'll thrash this out.

In other words, avoid any further testimony that

is now coming on that point, and this afternoon we will go into this whole issue. Can you argue today that?

MR. AMOROSA: I think so.

MR. J. PANZER: Your Honor, in view of what your Honor told me, I made other arrangements for this afternoon. I apologize to the Court.

THE COURT: You needn't apologize. You had a right to do exactly that. Will you be free at all?

MR. J. PANZER: I may be free from 1 to 2, but not after that.

THE COURT: All right. I will figure out something.

MR. AMOROSA: Your Honor, will you charge the jury with a limiting instruction?

THE COURT: Only after we have a recess.

MR. AMOROSA: I couldn't recall what your Honor said he was going to charge the jury. We want the jury charged, if I may state our position, that the testimony of Perna with respect to Albert Rossi and Lucas, should be considered against the defendant Lucas only, with respect to his intent and with respect to his knowledge, with respect to the crime charged. It shouldn't be considered against any other defendant.

THE COURT: Well, how does that differ from

what I said?

MR. AMOROSA: I just wanted to make certain of what your Honor said.

THE COURT: All right, gentlemen. Please understand that after we get together, I intend to have the jury called in, and I intend to proceed, and I intend to give this limiting instruction, and the government understands that the balance of today's testimony before this jury, will close at 1 o'clock, will deal with matters other than what is involved in the issues which we have just discussed, and we will deal with those issues whenever testimony along those lines is offered. I'm afraid we will have to get along without our friend Mr. Joseph Panzer this afternoon. I will give him a chance later in the day, or his colleagues can tell him what took place, or Ms. Oberman may be here. It won't be necessary to have him here, and we won't go ahead until Mr. Panzer has been alerted as to what took place in his absence. It's only a discussion -- I should strike out the word "only" -- it's a discussion on the law, and he will have to be acquainted with what goes on.

Now, we will make it fifteen minutes, but don't make it later than fifteen minutes from now, because I am sending for the jury at that time.

(Recess.)

(Jury not present.)

THE COURT: I have given further thought to what was before us and it occurs to me that since we are going to expand on this whole theme and ultimately make a ruling with regard to other conspiratorial acts that the better part of wisdom would dictate that we drop for the present a completion of the testimony given by Rossi because that issue is all involved with the other issues that have to be resolved.

If we can make an error now, it would be hard to dissolve it later, and since it's all of the same cloth, the same pattern, the same issue, I see no purpose in completing it now and then trying to take argument. That's silly. So we are not going to do anything more on Rossi this morning until the Court has heard the argument on the general proposition equally applicable to Rossi as it will be to other phases of the case.

Do I make myself clear?

MR. AMOROSA: Yes, you do, sir.

THE COURT: Then it's taboo, you are not to say another word about Rossi this morning until we have resolved the entire issue.

Secondly, I do not intend to say in the limiting instructions that the testimony of Perna with respect to

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Albert Rossi and Lucas should be considered against the defendant Lucas only with respect to his intent and with respect to his knowledge as to the claim charged. I am going to omit with respect to his intent and with respect to his knowledge with respect to the crime charged because the jury may get the impression that the Court believes that that testimony does amplify the intent and knowledge on the part of Lucas with respect to the crime charged. I want to give the defendant at this juncture the greatest benefit until the time comes for me to enlarge on it and to particularize on it, if you get what I am trying to say. Right now I merely want to say to the jury: "You heard the testimony of Perna with regard to Rossi and Lucas. I want you to know that that testimony is binding only on Lucas."

I am not going to say anything about with respect to his knowledge and with respect to his intent as to the crime charged in the instant indictment. I am merely going to say, "Whatever you heard on that is binding only on the defendant Lucas and not on the other defendant."

When we have resolved this whole issue, then we may come back again and give a more complete or fuller limiting instruction if, as and when we think it appropriate, but right now I don't want to go any further than I have just suggested.

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Mr. Amorosa, I will give you a chance right now to address yourself to it.

MR. AMOROSA: We have nothing to say.

THE COURT: Does counsel?

MR.HOFFMAN: Yes.

THE COURT: I shouldn't think they would. What do you want to say?

MR. HOFFMAN: In view of the fact a final determination is not to be made until later, in respect to Mr. Lucas I would ask the Court not to give a limiting instruction this is binding on Lucas because the Court may feel, after argument, it should be stricken and should not come in.

Then the jury will be told it is binding one minute and then told to disregard it later.

THE COURT: What do you say to that?

MR.AMOROSA: That is why we would like, your Honor, to have a ruling on the whole question right now.

MR. GOLDBERG: We would object to it.

THE COURT: How can I give a ruling now when I have yet to hear from counsel?

MR. AMOROSA: I understand that, your Honor, but we were prepared to go forward and we are prepared to go forward on it now. What will happen is the other defendants

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will stand and say they need a limiting instruction at this time.

THE COURT: They have already said so and I am trying to act on it. Now Hoffman gets on his feet and he says "Don't give a limiting instruction."

I don't know what he wants. First he says give a limiting instruction if you are going to give it at all, don't give it to them, I want a mistrial.

Then when we get over that hurdle he says give a limiting instruction and everybody says that. Now Mr. Hoffman gets up and says don't give a limiting instruction.

Make up your minds what you want the Court to do.

MR. AMOROSA: We want a limiting instruction.

MR. GOLDBERG: The defendant Pallatta wants a limiting instruction.

THE COURT: Anybody against a limiting instruction right now besides Mr. Hoffman?

(No response.)

THE COURT: We are going to give the jury a limiting instruction to the extent I have already indicated and no further.

Now, gentlemen, you remember yesterday

THE COURT: So you tell them the Judge would like to have them let me know when that young man appears again. Is that all right?

MR. CASTLE: Yes, sir.

THE COURT: There it is. Is that all right with you?

MR. AMOROSA: We would like him barred from the courtroom.

THE COURT: First let me see whether he is here. If he is here, I will do something possibly about it at that time. Otherwise I will do nothing.

There it is.

Get the jury, please.

(Jury enters the courtroom.)

M A R I O P E R N A, resumed.

THE COURT: Won't you please take your seats. Madam Forelady, is the jury room all right? Is it fairly comfortable?

THE FORELADY: Yes.

THE COURT: Ladies and gentlemen of the jury, you heard just before you stepped down out of the jury box last, you heard testimony given by the witness Perna with regard to Rossi and the defendant Lucas and he told us about Lucas in connection with other events having nothing to do with the instant crime, alleged crime, before us.

You heard that testimony. I want you to know that that testimony is binding only on the defendant Lucas and not on any other defendant. In other words, Perna told us that there was something said with regard to the activities of the defendant Lucas on other occasions of a nature similar to that which is involved in this conspiracy. I want you to know that the weight of that is for you, but that that would be finding in any event only on Lucas and it is not binding on any other defendant.

Do I make myself clear?

There will be occasions throughout this trial when I will say to you, "That's binding only on the person who said it and it is not binding on the others."

When I say that, you have to ahdere to it. Remember, we are her to determine whether or not the government has proven beyond a reasonable doubt the charge against each defendant separately. So when you come to each defendant you have to ask yourselves what the total evidence against defendant 1, defendant 3, defendant 5 is, each one separately, and the Judge says this particular piece of testimony is only binding on one defendant and it has got to be toted up with regard to the evidence against that defendant.

It makes sense. I have to tell it to you and you have to follow that instruction. Let me say if you violate

any principle of law that I charge you withk you are disregarding the law. The Judge is dutybound to make it crystal clear to you so that you will understand it and I hope every time that I undertake to explain a principle of law, I hope I will make it clear, and if I don't you raise your hand. That's another situation. You can raise your hand because it is something the Judge is saying to you, not a witness is saying. "Judge, I don't quite get it." I will explain it. I am anxious to have you recognize that these pronouncements by the Judge must be obeyed. When I say "Disregard what was just said," you have to wipe it right out of your mind. It is as though you never heard it.

Does anybody have any question on what I just said to you?

(No response.)

THE COURT: Thank you.

MR. AMOROSA: May I proceed, your Honor.

THE COURT: You may.

Let the record show it is now twenty minutes of noon.

DIRECT EXAMINATION (Continued)

BY MR. AMOROSA:

Q Prior to the recess, Mr. Perna, you were talking about your relationship with Mr. Lucas from some time in

e Cooper

UNITED STATES OF AMERICA

vs. 75 Cr. 657

JOSEPH MAGLIANO, et al.

September 29, 1975
10:45 a.m.

- - -

(In open court - jury not present.)

THE COURT: Good morning, counsel.

Gentlemen, I thought that unless you have something that has come to your mind since we last met, I thought we would take up the issue that was pending, and that is a presentation of an applicable law with respect to prior criminal acts.

MR. GOLDBERG: May I be heard, your Honor?

THE COURT: Yes, sir.

MR. GOLDBERG: Judge, I would like to throw on the table a distinction between two types of proof; one of which I am not suggesting that I concede that it is appropriate, but there is more possible support for the governmen position than the second type of proof.

The first type of proof, which we have already heard, in which other crimes come in is, for example, when Malizia speak to Perna and he says "Oh, I know Frank Pallatta, I dealt with him, or Tony dealt with him years

"o," -- now, that is part of a conversation.

Though Pallatta should be insulated from prejudice, I did not object to that. It came in as part of res gestae proof. Though it prejudiced the defendant to the extent it disclosed other crimes, I did not rise. That is one way it comes in.

The second way that it can come in, and the pernicious, unfair way it can come in, is if the government puts it on the stand a man, for example, like Anthony Manfridonia, who has no connection with this case, who says "I was involved in a conspiracy in effect pending before Judge Bonsal to ship narcotics to Pennsylvania. I received those narcotics from Frank Pallatta."

That is proof of other crimes, also. That comes in with a witness who is called to the stand for the sole and limited purpose of demonstrating other crimes.

Now, there is a distinction between the two, one, where one it comes in as part of the conversation between people intimately involved in this conspiracy, or alleged conspiracy, and in the second where the government resorts to a cold, separate witness who testified to other criminal behavior unrelated to this conspiracy on trial.

As I develop these arguments, I would hope that your Honor would keep these two things in mind, as I know

you will, and my position, in all candor, to the Court is that the first I can see your Honor saying "Well, I am not going to excise what took place as part of the conversation."

The second, I think, raises very serious questions with respect to delivering undue prejudice to the defendants, raising as it does the issue of propensity.

When you're faced with these questions, your Honor, whether the government should be permitted to resort to [illegible], the first question that he emerges in all of these cases is has the prosecution shown an actual need for this evidence, so that your Honor is warranted in risking the question or weighing the question of whether prejudice outweighs relevance. Has the government demonstrated an actual need?

It may be received if the issue on which the government offers the proof is really contested.

For example, the government has repeatedly said it seeks to offer such proof on the issue of intent. Intent, if your Honor please, would be an issue in this case if the defendants raised as a defense, or injected into this case, during either cross examination or the calling of witnesses, the fact that there was a mistake.

You will find repeatedly that when we talk about admitting proof of other crimes it is permitted on the issue

of intent to negate the question of mistake, so that if a defendant is coming across the border with white powder and he claims that he thought it was talcum powder, the government can resort to other similar acts to negate mistake.

If he passes repeatedly counterfeit bills and he says he didn't know about it on this one occasion that these were counterfeit the government may resort to other crimes to prove his intent which Professor Wigmore and Professor McCormack tell us is warranted where the defendant injects into the case the element of mistake.

In this case I suggest that your Honor might even withhold judgment until the conclusion of the defendants case. If the defendants have raised in this case either through cross examination or the calling of witnesses the question of mistake to the poirt where the prosecutor could come before this Court and show actual need, then the government may resort to such proof in its rebuttal case. But I submit in the present posture of this case, where intent -- i.e. -- the absence of mistake -- is not raised by the defendant, at least the defense of Pallatta and Bolella, and this is the only two defendants against whom this type of proof is offered -- there is no need to permit the government on its direct case at this posture to call a

witness who will testify to a wholly unrelated conspiracy designed to show, as Mr. Amorosa likes to calls it, a continuing pattern of criminal behavior.

A continuing pattern of criminal behavior, if we really stripped the verbiage from it, tends to demonstrate the defendant is the kind of person who has committed crimes similar to the one he is on trial for, and I don't think you will find any case that justifies permitting the prosecution to prove other crimes just to show that this is the kind of defendant whom the jury can expect will have committed this crime because he has committed other crimes for five or ten years much like this line.

That raises, your Honor, the serious issue of criminal character and propensity. I daresay that if you examine the cases, and in many ways I am touching on two problems that will face your Honor, the second problem will be much later -- that is, whether or not the witness takes the stand, the defendant, may he be impeached by proof of prior convictions. What I am about to say applies not only to the problem before us but to that. By that I mean I think you will find that even prior convictions of narcotics offenses, certainly within the ten-year period, or certainly in excess of the ten-year period, would not be admissible if Pallatta took the stand and was even convicted of a

criminal case involving narcotics. A fortiori, you ought to keep out instances where there hasn't even been a conviction.

The Court of Appeals in the Second Circuit in Puco, which dealt at length, I think, with the problems raised by narcotics convictions -- and I say if a narcotics conviction couldn't come in in this case a fortiori a prior "similar act" not resulting in a criminal conviction ought to be kept out.

The Court of Appeals said the trial judge must be very vigilant to keep out prior convictions of the same type as the one for which the defendant is on trial, lest the jury fall into the trap of propensity.

You will find in U.S. against D'Angelis, Second Circuit, 490 Fed. 2nd, 1004 and 1009, that the Second Circuit says in talking about the admissibility of prior convictions:

"Nor was it so similar to the offense charged that the jury was likely to slip into the belief that the crime alleged was merely a repetition of one previously proven."

Now, the Second Circuit said that, and they said that even in the Puco case, that the more you let in proof of conduct similar to the one charged on trial the more

difficult it is to give a curative instruction which will keep from the jury the danger of treating this as a propensity of criminal behavior.

I say again criminal convictions as the same as the one on trial ought to be kept out. Judge Bauman did the same thing in Tramunti. He was on trial for false swearing and Judge Bauman kept out a state perjury conviction rendered three years before the trial. Not because it was more than ten years old, but because it was so similar to the one on trial, false swearing and perjury, he felt after a review of the authorities, and I have the transcript in my hand, that he felt the jury couldn't possibly keep from its mind the dangerous issue of propensity when you allow the government to prove either through cross examination of the defendant on trial or through independent proof on other crimes, to the extent that you allow similar crimes you raise the question that this defendant is likely to be someone who is guilty of these kinds of crimes and is a person of bad criminal character.

I submit, your Honor, that it is a good analogy or starting point to consider the language that you will find in some of these cases dealing with the impeachment, the propriety of impeachment by similar crimes, and so that to that extent you will find a strong case for keeping out

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crimes which are similar to the one for which the defendant is standing trial, and from that you can easily bridge the gap to the issue of whether acts not amounting to convictions ought to come in to prove other crimes, such as the prosecutor wants in this case.

I submit, your Honor, that the two cases relied upon by the government are not at all appropriate. The Papadaka case, I think without burdening the record, I simply call attention to my letter of September 16th. That case does not authorize the governemtn in a case involving, as it does here, a long, far-reaching conspiracy, to simply prove another conspiracy of which the defendant was a part as a supplier that was not charged.

In placing aim, the second case relied upon by the government, the kind of proof offered in that case was, I daresay, innocuous, and far different from the case at bar where the government seeks to prove that Pallatta in effect was a supplier of narcotics to a wholly independent conspiracy operating between Pennsylvania and New York through this man Manfridonia.

Your Honor, in conclusion, I say that keeping in mind the fact that you must always ask yourself whether the government has demonstrated actual need, and that the curtain doesn't come down until this case is over with respe

to your power to authorize the government to bring in such proof if it is injected into the case, or an issue was raised by the defense through cross examination or defense witnesses, the government always has an opportunity on rebuttal if your Honor feels the need has not been demonstrated, I suggest that your Honor at this point ought to differentiate between proof coming in as part of conversations and permitting the government to present to this jury a wholly independent witness designed to subject defendant Pallatta to undue prejudice.

Thank you, your Honor.

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/1 am THE COURT: Does any other counsel for the defense wish to add anything to the argument advanced by Mr. Goldberg?

MR. EPSTEIN: I give the floor to Mr. Chance.

THE COURT: Yes, Mr. Chance?

MR. CHANCE: If your Honor please, for the sake of consistency and euphony, or whatever it should be, I would like to say on the record at this time that I would like to adopt the argument made by counselor Goldberg on behalf of the defendant Pallatta.

THE COURT: Very well, Mr. Chance.

MR. EPSTEIN: Your Honor, very briefly the defendant Bolella will advance the arguments made by Mr. Goldberg, and I would like to add to the argument one other matter, and that is that the government contends that these matters would be admissible as part of a common pattern of conduct under Rule 404b. Rule 404 generally follows what has always been the evidentiary rule of the Court, that that proof be adduced in instances where it is necessary to show motive, opportunity, propensity, to negate the defense of mistake, where the defendant will testify he thought he was dealing with perfume crystals. Or if you are dealing with a bank robbery, if Mr. Goldberg should decide to to rob a bank, and ask me to steal a car

to do that, that would be admissible on the bank robbery charge, because it is in preparation for the particular crime. The acts allegedly committed in 1966 or 1967, in 1969 and 1970 do not fall within any of the recognized categories as set forth in the rules.

The second problem is, of course, the lapse of time between the alleged acts which Mr. Amorosa so sets forth in his letter of September 12 and the period of time with which we are concerned in this indictment. Mr. Amorosa speaks of three acts.

One took place almost six years before the period of time set forth in the indictment.

Another took place four years before the period of time set forth in the indictment, and the last one in 1970, we are not given a month, took place almost more than three years before the period of the time with which we are concerned in this indictment. And then there is a three-year hiatus.

I would submit, your Honor, this is not evidence which goes to the matter which is before this jury, namely, whether or not these defendants were guilty in participating in a conspiracy during the periods of time set forth in the indictment, but it is evidence to show that these people have a propensity to engage in such conduct, and, therefore,

have engaged in such conduct with Manfridonia during the period of time alleged here. I think it is highly prejudicial, and I don't think it has any probative value on the matters that are before this jury in this case. I would object to its receipt in evidence.

THE COURT: Does any other counsel for the defe[illegible]ve anything to say?

Very well, the government now has an opportunity to present the government's position.

MR. AMOROSA: First, your Honor, I would like to ask Mr. Goldberg through the Court, of course, whether he has developed all of Mr. Edward Panzer's arguments? Mr. Panzer is not here, and Mr. Panzer indicated that Mr. Goldberg would develop his arguments.

MR. GOLDBERG: I have, your Honor.

MR. AMOROSA: Thank you.

My remarks will also be a brief. Mr. Goldberg's ability as an advocate conceals the utter lack of merit of what he is attempting to say. The government relies in its offer of proof with respect to the testimony of Manfridonia and the testimony of Perna and the testimony of Verzino, the anticipated testimony of Verzino, on Rule 404b of the Federal Rules of Evidence, first, as your Honor knows, are in effect at this time, and which

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govern your Honor's decision:

"Other crimes, wrongs or acts -- Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or the absence of mistake or accident."

We submit here, your Honor, and as Mr. Goldberg has already indicated, we rely on this testimony to show a course of or a pattern of conduct in which these defendants engaged, in addition to showing a common plan on the part of these defendants to violate the federal narcotics laws. We do not offer this testimony to show propensity on their part to violate the federal narcotics laws. We also offer the testimony to show intent. When these men entered a plea of not guilty they denied each and every allegation of the indictment, one of which was that they acted intentionally and knowingly and unlawfully. This proof will establish that they did act with intent when they committed the crimes in this indictment, and it was simply a pattern or course of conduct which developed prior to the charge, prior to 1973, and continued into 1973.

The cases with respect to this point of law, your Honor, are legion. Very recently in United States v. Rivera, decided by the 2nd Circuit on July 21, 1975, the 2nd Circuit had again occasion to speak to this problem, and in United States v. Rivera the 2nd Circuit indicates where the evidence is used by the government to show the background and development of a conspiracy, it is not introduced solely to show criminal character.

And, of course, the prior similar acts in Rivera were affirmed. The trial judge's discretion rules in this matter, and the 2nd Circuit has affirmed conviction in which trial court judges have permitted the use of prior similar acts, such as in this case.

In United States v. Papadocus, which has already been referred to by Mr. Goldberg, is another case in point. In United States v. Papadakis the 2nd Circuit indicated at page 294-295, and the report is 510 Fed. 2d, the charge of conspiracy to commit criminal acts always requires proof of a course of conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes.

We submit that with respect to the testimony of Manfridonia, the additional testimony of Perna with respect

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to the conversations that he had with these defendants, the testimony of Verzino with respect to conversations would show that these defendants were engaged with Virzino over a long period of time in the distribution of narcotics, Papadakis is squarely on point and permits your Honor to have the government utilize this evidence in proving its case.

I will conclude with this, that Mr. Goldberg's analogy in impeachment cases and his citation of United States Puco is also misleading. Of course, the argument there is if the government can't use to impeach a defendant, to show that there is a prior narcotics conviction, how can it use it in a direct case when there you have the conviction itself. United States against-Puco was decided some years ago. From the time of United States v. Puco until today United States v. Christopher was decided, 410 Fed. 2d, 865, 2nd Circuit, 1972, in which the 2nd Circuit affirmed the conviction in which the government was permitted to impeach the credibility of a defendant in a narcotics case with, I believe, a 12 year old narcotics conviction.

It is a matter of discretion for the trial court, and the tria court will not be reversed until there is a clear abuse of discretion below.

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Your Honor, there being no clear use of discretion, the government should be permitted to introduce these prior similar acts in this case.

THE COURT: Before you sit down, Mr Amorosa, would you answer this question: Assuming in a criminal case a witness offers a recital in detail which if believed overwhelmingly shows intent, is it the position of the govenment that nevertheless in order to establish a continuing conspiracy of which the acts embraced within the indictment on trial is a part, would make it, nevertheless, admissible?

MR. AMOROSA: Your Honor, our position as indicated is not only that we want to use these prior similar offenses with respect to the intent of the defendants, but also with regard to a plan or common pattern of conduct over the years, and that is what we rely on primarily. That is that is permitted by the rule. Of course, we offer it with respect to intent and knowledge. I have to conscede that assuming Mr. Perna is believed there is not going to be a question here with respect to intent. These people are going to be convicted, but we again reiterate that we put forth this position primarily based on the argument that these prior similar acts show a course or pattern of conduct begun prior to the allgations

in the indictment and carrying into the allegations in the indictment. Papadakis and the other cases to which I referred a few minutes ago go directly to that. It is totally permissible, and as your Honor knows, prior to the federal rules of evidence being promulgated, the rule in the 2nd Circuit was one of inclusion; everything comes in unless the government is offering it solely to prejudice the defendant. We represent that we are not offering this testimony to prejudice anyone. We are offering this testimony to show a course and pattern of conduct.

THE COURT: Mr. Goldberg, do you wish to say something?

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MR. GOLDBERG: Your Honor, the government has repeatedly quoted from the case about the need to show background. Of course, that caused me not to rise when Perna said Malizia said, as part of my conversation, "We know Bolot. He's been dealing with Tony for years."

That's part of the background to this very conspiracy, and the case in the Second Circuit, much as I dislike it, say that you cannot excise it because it is part of the background as to the emergence of this conspiracy. That is far different than the government resorting to the Manfridonia incident.

To put it clear before your Honor, since we have an indictment in that case we can tell you what it is about. This Manfridonia dealt in a narcotics conspiracy with people in Pittsburg unrelated to people in this case, but perhaps he might have gotten his narcotics from Pallatta.

The government says it ought to be able to show a continuing pattern of criminal behavior. Isn't that really verbiage that is used to say to you, in effect, "We want to show propensity. We want to show if he committed one bank robbery he committed a hundred"?

Would you permit in a bank robbery case -- and this is rhetorical of course, and your Honor doesn't have to answer -- where the issue was whether somebody robbed the

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First National City Bank to show that he robbed twenty banks?

THE COURT: The answer, and quickly, is a thousand times no. May I say, while you have been helpful you are not being helpful at this point by repeating it. I would abhor the notion of doing so. I would cringe, and I would rather err by keeping it out for just that, on that ground, or any of the other points you just raised, but we still have the Court saying to the trial judge, "If you have evidence, however, Judge, of a course or pattern of conduct you ought to take it."

What do I do with that theory?

MR. GOLDBERG: Yes, you find that in narcotic cases. But you will also find in those cases the admonition to the judge to consider the particularized need for such testimony.

Recognizing as you will the immense possibility of prejudice -- and the relevance, of course I conceded -- you ask yourself "Has the government shown a real need for this type of testimony?"

He stands up and says candidly and honestly he has Mr. Perna, he has Mr. Verzino, and if they are believed, these people will be convicted. I daresay he is correct, and he's got witnesses who dealt face to face with

these defendants over a long period of time.

What is the particularized need, Mr. Amorosa, through your Honor, for having to bring in a separate criminal conspiracy if not for the purpose of showing propensity?

Yes , there is language, just as Mr. Amorosa has quoted, but also the judge is admonished to consider the question of particularized need and the issue of whether the defendants really contest a) intent, b) identity, and c) motive.

I say to the Court with all due respect is it ready yet, because that hasn't been injected into the case through witnesses, cross examination or opening.

THE COURT: But Perna is still on the stand and there is a portion of his testimony that we halted until a resolution of this very issue. I told the government not to pursue it. He wants to recall Perna, and -- continue, rather, with Perna -- and undoubtedly bring out the portion that he held in abeyance pursuant to the Court's direction.

So I have to resolve that issue now.

MR. GOLDBERG: That's true.

THE COURT: And I am going to. So I want your help and you have given all you possibly can. I know the danger, but it is the duty of the judge to decide whether or

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not the law supports the government on this, and if the law does support the government it is the duty of the judge to make it crystal clear to the jury by way of a limiting instruction.

We can't have the jury act under the notion that you have presented, that these acts show prior behavior and therefore they must have engaged in the behavior charged against them in this trial. All those horrible and dangerous and those situations that are saturated with danger, as this is -- make no mistake about it, if I have to rule in favor of the government I have to secure it very, very carefully, and it behooves the judge to exclude all other considerations by the jury other than that which prompts the Court's recognition of the government's position.

I don't say I will so rule. We have given it thought. I wanted the benefit of your thinking, gentlemen, and you have given it to me. Unless there is something else, we will take a short recess and make up our minds which way to rule.

I should think, however, no matter which way we rule it will relate only to each witness.

For instance, we will rule now, if we rule at all in favor of the government, with respect to Perna. The issue will still be alive with regard to any other witness

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put on the stand, if you get what I'm trying to say.

MR. GOLDBERG: Yes, your Honor.

THE COURT: Very well. You sit there as though you don't understand. Do you understand what I'm saying?

MR. AMOROSA: Yes, sir.

THE COURT: Then say so, so I will know you recognize what I'm saying.

Excuse us, gentlemen.

(Recess.)

THE COURT: Gentlemen, as I have already indicated we are first to agree and insist that this position advocated by the government is perilous, and should not be exercised lightly. We have spent time examining the authorities long before the argument this morning. What you have really done is to emphasize the points that we have concluded are guides to our determination.

The government asks, or seeks to offer this proof on two grounds:

One, to show the intent of the defendants in connection with the charges against them.

Two, to show these prior narcotics transactions were part of a common pattern of conduct on the part of the defendants which continued into the period charged in the conspiracy now being developed before us.

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As authority for its position the government cites two cases in its letter, U.S. against Papadakis, and U.S. against Blassingame, 427 Fed. 2nd 329.

We might as well give you the full citations even though you have referred to them.

Papadakis is 510 Fed 2nd 87 to 94, Second Circuit, 1975.

In a letter dated September 16, 1975, copy sent to the United States Attorney, Mr. Goldberg, attorney for the defendant Pallatta, responded opposing the government's position. Mr. Goldberg cited McCormick on Evidence, 1972 edition, Wigmor Section 217, Federal Rules of Evidence 403, and three cases from outside this circuit, United States against Goodwin, 392 Fed. 2nd 1141, Fifth Circuit 1974; People against Condon, 26 New York 2nd 149, 1970, and United States against Simmons, 503 Fed. 2nd 831, Fifth Circuit, 1974.

We have examined thoroughly all the authorities cited. We have determined that this evidence of prior similar acts, although irrelevant on the question of defendant's intent and irrelevant on the issue of propensity is admissible to show the background and development of a conspiracy.

U.S. against Torres, docket numbers 74-2503,

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and 75-1167 Second Circuit, decided July 2, 1975, slip in at pages 4579-4580.

In this circuit evidence of other criminal offenses is admissible if it is relevant for some purpose other than merely to show a defendant's criminal character, provided that its potential for prejudice to the defendant does not outweigh its probative value.

U.S. against Papadakis, U.S. against Reilly, 445 Fed. 2nd 1245 at 1288, Second Circuit 1971. U.S. against Deaton, 381 Fed. 2nd at 117, Second Circuit, 67.

In Papadakis the Court explained this circuit is "We had had to the inclusory form of the rules, that evidence of other crimes is admissible if relevant except when offered solely to prove criminal pattern."

That's at page 294.

In the present case the evidence is relevant and not offered solely to prove defendant's bad character. In fact, it wouldn't be received for that ground, not for an instant. Evidence of the narcotics transactions mentioned in the government's letter and presumably the other evidence of prior criminal acts is relevant as portraying the background and development of a pattern of conspiratorial conduct engaged in by the defendants.

See U.S. against DeSappio, 435 Fed. 2nd 272 at

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page 230, Second Circuit, 1970.

It should be noted in particular that several of these transactions occurred in the Cross County Shopping Center, a focus of much of the narcotics activity alleged in this indictment and bill of particulars. Thus, this evidence is clearly relevant in depicting a far broader conspiracy of which the crimes charged formed only a part. See U.S. against Drummond, 511 Fed. 2nd 1049, 1055, Second Circuit, 1975.

U.S. against Cohin, 489 Fed. 2nd 945 at 949, Second Circuit, 1973.

The mere fact that some of the prior criminal acts may have occurred seven years before the indictment charged does not bar their admissibility. See U.S. against Gerry, 515 Fed. 2nd and 130 at 140 to 141 Second Circuit 1975.

Moreover, in the precision it cannot be said that the evidence is offered to prove criminal character. We would not tolerate that. We put that again. We have taken the government's statement and if it should prove to be otherwise, why, a motion for a new trial and end this trial would be encouraged and acted upon. But in Papadakis we have got this language "The charge of conspiracy to commit criminal acts always requires proof of an account of

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conduct that will circumstantially prove the corrupt agreement. There is no more convincing proof to a jury than that of a pattern of conduct which unfolds before their eyes."

That's at pages 294 to 295.

And so, in conclusion, we have weighed both sides and have determined to admit this evidence to show that the defendants engaged in a pattern of conspiratorial criminal conduct and we receive it only for that reason, not for intent, not for any of the grounds denounced, and properly so, by Mr. Goldberg and Mr. Epstein.

However, at the time of the admission of this evidence we intend to instruct the jury as to the limited purpose for which the evidence has been received. We will also make a retroactive instruction regarding the evidence already admitted with respect to the defendant Lucas. See U.S. against Klein, 340 Fed. 2nd, 547, Second Circuit, 1965.

Our limiting instruction will be as follows:

"Ladies and gentlemen of the jury, testimony regarding prior narcotics transactions not charged in the indictment before us is admissible only for the purpose of showing the background and development of a criminal conspirac Such evidence is not to be considered by you as proof of the actual conspiracy or acts here on trial."

That is adapted and adopted from Klein, already mentioned.

Finally, gentlemen, we should point out that the government revelation last Friday morning of the identity of government witness Manfridonia renders moot Mr. Epstein's motion for disclosure and continuance.

That's the Court's ruling.

Now, hereafter when this same proposition comes up the Court will insist on an offer of proof in the absence of the jury, of course, in order to make a ruling as to whether the proposed evidence dealing with prior criminal acts is admissible. The Court cannot take judicial notice of what may come in and must be confronted with it before a ruling is had.

In other words, I am only ruling right now with respect to the testimony to be elicited from the instant witness.

MS. OBERMAN: Your Honor, I was a bit unclear on hearing the limiting instruction that you propose to give whether or not the jury would get the understanding that the evidence was being admitted to establish background as to those defendants like the defendant DeLutro who were not involved in those acts.

THE COURT: Of course that would always be added.

And not only that, but we will distinctly tell them -- I was giving you what the case of Klein suggested, and we were adopting that, and we shall say that, and on top of it we shall say it is only relevant to the defendant who is covered in the testimony, unless the government can show me why we should do otherwise.

Then of course we will also show or emphasize to the jury that by no means is this to show criminal behavior on the part of or character on the part of any one of the defendants on trial. What do you say to that, Mr. Amorosa?

MR. AMOROSA: We agree the limiting instruction should specifically tell the jury they should consider that evidence of prior similar acts as to those defendants who are mentioned in it only, and their plan and their course of conduct coming into the conspiracy charge and not as against any other defendant not mentioned in the testimony.

THE COURT: Precisely.

Yes.

MR. GOLDBERG: The Court has ruled. May we pass on to another matter, excepting your Honor's ruling?

THE COURT: Except the Court has an agenda as to other matters.

Mr. Lang, you have something that you wanted to

A (Continuing) Bolot told us that his regular connection hadn't come through for them as he usually did, and that Frankie and Red Hot and Mikey's connection didn't come through at that time, either.

Q Was anything else said about these connections?

A Malizia asked "You mean Mikey and Red Hot got their own connection?" and Bolot said, "Yes," that Mikey and Red Hot had met somebody in jail. That they struck up a connection with, and then when they got out of jail they were able to get goods from this other person.

Q Was anything said as to how much goods they were able to get?

A I don't remember exactly. He said something like ten or fifteen every month or two.

Q What else was said in terms of connections?

A Only that their other connection, the other connection that Bolot and Joe the Grind had from years before, had failed them at this particular time, that they usually got goods from them about every six or eight months and he hadn't come through for them at that time.

Q What kind of goods were involved with these connections?

A Pure goods.

THE COURT: Ladies and gentlemen of the jury,

you have observed that this witness has testified with regard to prior matters, prior arrangements before the acts embraced within the indictment we are trying came to pass. In other words, can a witness tell us about other conspiracies, other plans? What about that?

That is not charged here. Why does a Judge allow this witness to touch on other behavior?

Is it to show a similar course of conduct? Is it to show that this conspiracy with which we are dealing did not start and end with the dates in the indictment but was a continuation of some other plan or conspiracy? Is it to show that they did this on a prior occasion, some of them, and, therefore, they must have done it here?

No, of course not. A thousand times no.

Is it to show that by this prior behavior that these are bad people? Are you allowed to do that under law? No.

Then why do you let it in, Judge? Because the law says that if the evidence deals with a continuation of a common scheme or plan that evidence may be received to show that it was a part of a common plan or scheme, and you are allowed to go into the background and the development of the conspiracy before you.

Do you understand me?

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(Affirmative.)

THE COURT: That is just with regard to the conspiracy before us. It isn't for any other reason. You cannot deduct anything from that testimony, and if you do, you are befouling your oath.

How far can you go with that testimony? Just this. That you can consider it in connection with background and development of the conspiracy you have under consideration.

Remember, you cannot gather from that that they must have done it before and therefore they must have done it this time. No. You cannot take it into consideration to show culpability or character. Nothing like that. It must not be considered in that connection.

And so from time to time there will be evidence that is received with a limiting instruction. And when the Judge gives you that limitation you cannot just open up the flood gates, you have got to keep that testimony within the confines that I say it belongs.

Madam Forelady, did I make it clear to you?

JUROR #1. Yes.

THE COURT: And to you?

JUROR # 2: Yes.

THE COURT: And to you?

JUROR #3: Yes.

THE COURT: And you?

JUROR #4: Yes.

THE COURT: And you, sir?

JUROR #5: Yes.

THE COURT: And you?

JUROR #6: Yes.

THE COURT: And what about you, ma'am?

JUROR #7: Yes.

THE COURT: And you?

JUROR #8: Yes.

THE COURT: Madam?

JUROR #9: Yes.

THE COURT: And you?

JUROR #10: Yes,

THE COURT: And you?

JUROR #11: Yes.

THE COURT: And how about you?

JUROR #12; Yes.

THE COURT: And you, Alternate #1?

ALTERNATE JUROR #1; Yes.

THE COURT: Do you get it?

ALTERNATE JUROR #2: Yes.

THE COURT: Do you get it?

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ALTERNATE JUROR #3: Yes.

THE COURT: Do you get it?

ALTERNATE JUROR #4: Yes.

THE COURT: Do you get it?

ALTERNATE JUROR #5: Yes.

THE COURT: Now, let's go further.

t2/1 pm

Now let's go further. That evidence, even though it deals with the development or the background of the conspiracy with which you are confronted, it will relate only to those that the witness claims were involved. It is not binding on anyone other than the person, the defendant he mentions; it is not binding on all the defendants; it is received only for the purpose of developing a background of the conspiracy with which we are concerned, and even though that is received, you can only apply that evidence to the persons indicated in the testimony and no one else. One of the things that is forbidden to the Judge and forbidden to you -- and it has been emphasized by the high court, by the Supreme Court of the United States -- this evidence of other acts must never be considered in derogation of the character of a defendant on trial.

One of the most unfair things one can do is to take that evidence and hold it against a defendant on trial as an example of his behavior, or to use other language, to show what kind of a guy this is. That would be terrible. This has nothing nothing to do with character evidence. I repeat, it only has to do with the conspiracy with which you are concerned, to see the development of that particular conspiracy, the background of it, and what weight you wish

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to place on that evidence. It is allowed in for the sole reason that I have emphasized.

I thank you for listening to me, and don't feel incensed if I repeat myself, because it is a natural thing for me. I have been doing it all my life, to explain, and when you explain things to people to whom this is foreign material, you are supposed to make sure they understand it, because it would be perilous to give some mumbo-jumbo. I want to be assured that you understand it.

Now, are there any questions any of you have with regard to the proposition I have just laid before, you the proposition of law? Thank you.

BY MR. AMOROSA:

Q Mr. Perna, was anything said whether you could get pure goods?

A Yes, we asked Bolot on numerous occasions whether we can get pure goods. They promised us they would try to get it for us some time later on.

At this time the subject came up again, and they said that at this time it would be impossible, but they would still work at it, that they would go back, talk to their partners and discuss howmany packages we can have with the goods they had on hand. At that time we pulled up by a parking lot --

were made. See United States against Lipton, 467 F. 2d 1161 at page 1168, Second Circuit 1972.

The present rule has significantly changed this, as the advisory note makes clear: "Under the rule, prior consistent statements are substantive evidence that prior statements is consistent with the testimony given by the witness and if the opposite party wishes to open the door for its admission in evidence no sound reason is apparent why it should not be received generally."

Thus, there is no need to instruct the jury as to the limited effect of the admission of the testimony. Compare United States against Zeehandelaar, 489 F.2d 352 at 357, Second Circuit 1974.

Accordingly, the Court supports the government's position with regard to Perna's prior consistent statements.

Gentlemen, I wonder whether you care to come inot chambers rather than discuss on the record your reaction to night sessions, and I wonder whether at this time there might be other matters counsel care to call to my attention.

MR. AMOROSA: If I may, briefly I would like to bring to your attention in terms of red flagging this issue that Verzino will be offered not only to prove this particular conspiracy against these defendants but we will

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offer some prior similar act testimony against Pallatta, Bolella, Magnano, West and Carbone, and several other defendants who are not on trial.

This testimony will be developed in direct examination and will concern events which occurred in the beginning of the 1960s and carried into the year 1965. Narcotics transactions which the witness Verzino directly participated in with these particular defendants, including, as I said, Mr. DeLutro. And we want to red flag that now.

We also ask the Court to make a ruling on it because we believe Mr. Varzino will be a witness this afternoon, and he will be getting into it early in his testimony with respect to this background information.

We offer it again for the purpose of showing a common scheme and a course or pattern of conduct on the part of these defendants which lad into theperiod of the indictment. Just as we did, if your Honor will recall, as I am sure you do, with respect to the testimony of the witness Perna.

THE COURT: We ruled on that. We said "yes" to it, didn't we?

MR. AMOROSA: It was my understanding, your Honor, that the government was supposed to bring it to your

-dmissible. Your Honor reserved ruling on this several days ago based on Mr. Goldberg's argument and my argument on it, and Your Honor said you would get a decision to us as qucikly as possible with respect to whether Manfridonia will be permitted to testify to these prior similar acts.

THE COURT: Let me come back to that.

MR. AMOROSA: Yes, sir.

THE COURT: What else?

MR. AMOROSA: Just one brief thing, your Honor. When witness Verzino is on the witness stand, the government will have some intensive security in this area behind the courtroom. I just want to put that on the record to make sure the Court is aware of it.

I also would like your Honor to rule now, and to issue an order, that any materials in the possession of the state government, the local authorities, which relate to any 3500 material that Verzino may be involved in, be turned over to the federal authorities.

Now, I have gotten, I am sure, all of it at this time, but I want an order so I can represent to those local authorities across the stree that your Honor has ordered that everything be turned over to us so that we can furnish counsel with it.

THE COURT: I should certainly think that is the

question. It is leading and suggestive. And even though I did not allow him to finish, you can see from the beginning of that question it leads into an area that is improper.

THE COURT: I don't see how I can tell that. Let's hear from Mr. Amorosa.

MR. AMOROSA: I will rephrase the question.

Q When didyou go to the Altanta Federal Penitentiary?

A 1966-67.

Q From 1959 to 1966 or 1967 didyou sell narcotics?

A Yes.

Q What was the frequency of these sales of narcotics?

A Frequently

THE COURT: Wait a minute. While I talk everybody remain quiet, whether you like itnot.

Mr. Amorosa, I would suggest that that calls for the operation of his mind. You can put the question another way.

MR.AMOROSA: Let me try to ask it this way.

Q How many times did you buy or sell heroin from 1950 until 1966 approximately and roughly?

A Many times.

THE COURT: The question really is, were you in the racket daily during that period of time? Yes or no?

THE WITNESS: Yes.

Q With respect to the people that you have already mentioned from the witness stand, who, if any one of those people, did you buy or sell narcotics with in this period?

MR.GOLDBERG: Your Honor, I object to this whole line of inquiry, and if you permit me, instead of getting up as these questions proceed, preserve my position as earlier stated with your Honor in camera.

THE COURT: And in which all the defense join?

MR. GOLDBERG: Yes.

THE COURT: Ladies and gentlemen of the jury, there has been a lot of testimony that has been adduced so far, and while I am quite sure you keep in mind everything I say to you, it would be worthwhile to refresh your recollection reg arding something I have already explained.

MR. GOLDBERG: Your Honor, I want to heed your admonition and not to talk when you are talking, but on behalf of my client I would be willing not to have you advise the jury with respect to the cautionary instruction, even though you have offered to do so. I want the record to be clear, that at least my client does not ask for such an instruction.

THE COURT: The Judge feels he ought to give it. There was an occasion when I endeavored to

explain to you that testimony might be received for several reasons, that if I did not explain it to you, you might deduce from that testimony conclusions that are unwarranted and that the law does not endorse.

The witness is about to testify with regard to dates not covered by the indictment before us on trial. They antedate that time. Well, since it does not come within the four corners of the indictment, why do we receive it?

As I explained on a prior occasion, we received only, solely, exclusively for the purpose of showing the development of the conspiracy embraced within the indictment which we are now trying. It is the government's position that this testimony dealing with prior dates relates to the same conspiracy encompassed within the indictment now before us and that this evidence, says the government, is to help establish that what the government claims in the indictment returned by the grand jury really did take place. It lends credence, support, because, says the government, here is the development of this very conspiracy which is embraced within the indictment, not another conspiracy, the same conspiracy.

Now, suppose the jury is impressed with a piece of evidence that comes out with regard to this conspiracy,

but which antedates the indictment now before us, would that warrant the jury in saying that that lends credence to the indictment, to the conspiracy embraced within the indictment?

A Yes, only for the purpose of showing the prior history or development of that conspiracy, but for no other reason. You can't say, "They did it before, they must have done it during this period." That is out. You would be violating your oath if you did that. And, therefore I must strain myself to be mighty sure that you remember that at all times and never forget it, that this testimony dealing with dates prior to that which is embraced within the indictment before you is solely and exclusively and only for the purpose of showing the prior history and the development of the very conspiracy which we are now engaged in determining.

Have I made myself clear? Don't you see what a jury unenlightened can do with that kind of testimony? It could run all over the lot and apply 50 other reasons. And the law says no, never, not for a moment, can you do it. You can only consider it from the exclusive point that I have emphasized.

Madam Forelady, do you think I have made myself clear?

MADAM FORELADY: Yes.

THE COURT: How about you? Does anybody fail to understand it? Do you understand this is the same thought I tried to emphasize on a prior occasion, Professor?

A JUROR: Absolutely.

THE COURT: Mr. Chance, the Court recognizes you.

MR. CHANCE: We ask for a five-minute recess.

THE COURT: You have a five-minute recess.

(Recess.)

THE COURT: Ladies and gentlemen, I apologize to you for not adding this in connection with the explanation I gave you with respect to the prior acts or similar acts. I want you to know that evidence is admissible only against the defendant mentioned by the witnesses, only against those defendants mentioned by the witnesses. For instance, with regard to dates prior to that which we find in this instant indictment before us, and the witness speaks of only one defendant, that testimony relates only to that one defendant, and not others.

BY MR. AMOROSA:

Q You testified, Mr. Verzino, that you were engaged in selling heroin from approximately 1959 until the time you went to jail? Is that correct?

A Yes.

Q Of the men you have already mentioned in your testimony here, who, if anyone, participated with you in those endeavors?

THE COURT: During that particular period.

MR. AMOROSA: Yes.

MR. GOLDBERG: I object to the question, "Who participated with you in those ventures."

THE COURT: It is quite general. Do you want to reframe it?

MR.AMOROSA: Your Honor --

THE COURT: The Judge said so. So there it i[s]. Wait till court adjourns and give your estimate of the judge as long as it is outside the door.

MR. AMORODA: I did not know it is a ruling.

THE COURT: It is a comment that indicated to you that the judge was not exactly pleased with the phraseology of that question, and I more or less asked you to try it again. Do you mind?

3 pm

Q Did you buy and sell heroin in this period -- that is, from 1959 until 1966?

A Yes, I did.

Q Who did you buy and sell heroin with in this period we have already mentioned?

A Mr. Pallatta, Mr. Magnano, Mr. Carbone, Mr. Macchiarola, Mr. DeLutro and -- that's it.

Q In what quantities, Mr. Verzino?

A Multi-kilos.

Q What purity?

A High purity.

Q Anybody else?

A Besides Pallatta, Magnano, --

THE COURT: Besides those you have just listed, anyone else?

THE WITNESS: Yes.

Q That you have already mentioned?

A Repeat the question.

Q Anyone else that you have already mentioned in your testimony?

A No. There was other people, but -- I don't quite understand the question.

THE COURT: Neither did I.

Q What was your relationship with Mr. Pallatta

in 1959?

MR. GOLDBERG: I object to "What was your relationship?"

THE COURT: Objection sustained.

Q Who did you buy heroin from from 1959, approximately, through mid-1960?

A Many places.

Q Did you have one source from which you got more heroin than any other source from 1959 through the middle of 1960?

A Yes.

Q What was that source?

A Mr. Pallatta, Mr. Magnano.

Q Did there come a time in this period in which you sold yourself heroin to Magnano and Pallatta?

MR. GOLDBERG: During the period of time you sold yourself. That question makes no sense, respectfully, your Honor, gramatically.

MR. AMOROSA: I will withdraw it and rephrase it. The way Mr. Goldberg reiterated it it didn't make sense. Perhaps I misspoke.

THE COURT: Try it yourself.

Q You said you were purchasing narcotics from Pallatta and Magnano in 1959 and 1960, didn't you?

A Yes.

Q Did there come a time during this period in 1959 through 1966 when you personally sold narcotics to any of the defendants you have mentioned?

A I introduced some of the defendants to a connection one time.

Q Who did you introduce to the connection?

A Mr. Bolella, and Mr. Pallatta, I believe.

Q Who was the connection you introduced them to?

A A man named Joe Ragone.

Q Would you spell Ragone, if you can?

A R-a-g-o-n-e.

Q When did that occur, Mr. Verzino, roughly speaking, unless you can tell us exactly?

A Some time in 1962.

Q After you made that introduction, did you speak to Pallatta and Bolella with respect to it?

A Yes, I did.

Q What was, in substance, the conversations that you had with respect to that introduction?

A I don't recall exactly.

Q In substance.

A That I had done something with him.

THE COURT: What do you mean by that? We don't know what that means.

THE WITNESS: The traffic in narcotics.

THE COURT: In other words, did those people -- what's the names?

MR. AMOROSA: Pallatta and Bolella.

THE COURT: Did they talk to you and say what the outcome was of your introduction of them to Mr. Ragone?

THE WITNESS: Yes.

THE COURT: What did they say in substance?

MR. EPSTEIN: I would like to know who said what, not "they."

THE COURT: You are entitled to that.

Do you remember what was said?

You must realize how difficult it is for a defendant on trial to know what happened unless you say "I said so and so and he said so and so to me."

THE WITNESS: I can't recall exactly what was said.

THE COURT: I don't want you to recall exactly if you can't, but what you do recall you are supposed to tell us. Do you understand?

THE WITNESS: I recall introducing Mr. Bolella one afternoon on a corner to Mr. Ragone and asking Mr. Bolella

if he wanted to meet the man. He said "Yes." He met the man. I introduced him and I asked him later "Did you do anything with him?" And he said "Yes."

THE COURT: All right. That's all you're being asked.

And what did this other person -- Bolella and who?

MR. AMOROSA: Pallatta.

THE WITNESS: The other person was there. I don't recall what the other person said.

THE COURT: He was there when you got the answer you just gave, is that it? Is that what you mean? He was present?

THE WITNESS: He was present, yes.

THE COURT: And you don't remember what Pallatta said?

THE WITNESS: Not exactly, no.

Q Did you have any partners yourself in this period from 1959 through 1966, or thereabouts, in your business of selling heroin?

A Yes, I did.

Q Are any of those partners the people you have mentioned today?

A At times.

Q All right, let's start with the first time you can recall. Tell us of the people you mentioned today -- and let me state them for the record, if I may --

THE COURT: No, no, he must do the stating.

Q Of the people you have mentioned today, tell us who you were in partnership with and tell us in what period of time, if you can recall.

A Well, in 1960, early 1960, to about '61, Mr. Magnano and I were partners on a customer.

Q What do you mean when you say you were partners on a customer?

A We were selling heroin to a customer of Mr. Pallatta's, and me and Mr. Magnano were delivering the heroin to him -- thst is, selling it to him.

Q Who was the customer?

A A man named Frank Ross.

Q Where was Mr. Pallatta getting the heroin?

A From a man named Jack Bove, Jake Bove.

Q B-o-v-e?

A Yes.

Q Is that his real name?

A Yes.

Q Subsequent to that partnership with Mr. Magnano in this period, did you form an additional

partnership with any other defendant that you have mentioned?

A I had dealings with another defendant.

Q Who was that?

A Mr. DeLutro.

Q I'll come back to that later. Subsequent to this conversation that you had with Mr. Pallatta up by the Moon Pick Social Club, did you speak again with Perna and Malizia?

A Yes, I did.

Q When, with relationship to the last conversation with Pallatta?

A Shortly thereafter, a day or so.

Q Where?

A At a restaurant in a hotel near the building I lived in.

Q Do you recall the name of the restaurant?

A No. I know the name of the hotel.

Q What was the name of the hotel?

A The Coney Island Hotel.

Q What was said in that conversation, in substance, Mr. Verzino?

A Mr. Malizia asked me if I had made up my mind yet what I was going to do, and I said "Yes, I thought I would like to go partners with them," and he asked Perna,

THE COURT: Objection overruled. Go ahead.

A (Continuing) I said that it wasn't a customer, that it was Tony Stassi, a man named Tony Stassi, and there had been a possibility at that time of sending him merchandise that we had obtained through a Frenchman in Atlanta, and because he didn't keep the appointment that we had sent the merchandise to Ernie Malizia instead and his brother, so he said he didn't know that, and he said that my mother had moved and he had had no way to get in touch with me.

I said, "Yeah, I know."

THE COURT: I take it the government offers this phase of the witness' testimony in support of prior testimony already adduced?

MR. AMOROSA: Yes, sir.

THE COURT: The ruling is reiterated. The objection is overruled. The testimony is relevant and will remain.

Go ahead.

Q What else was said at that meeting, Mr. Verzino, if you can recall?

A He asked me what had happened. I told him that we had obtained some merchandise, but since to my knowledge the connection had gone dead but that if possible I would try to re-establish it, and I asked him how come, you know --

we were talking about the appointment, and he said he thought it was a customer. And he asked me about the man named Vincent Severio, who had been my partner and who was a fugitive. I said I didn't know where he was.

Q He had been your partner in what?

A The narcotics business.

Q When?

A From 1963 to 1965 or '66.

Q What did Bolella say with respect to that name?

A He just asked me "Have you heard from Tappy? Do you know how to find him?"

I said, "No, I haven't heard from him. If I do, do you want to find him?"

And we just got off the subject, I don't know, it just didn't seem important.

I asked him, I said to him, "How come things are so rough with the merchandise?"

He said that they are picking a high figure and --

Q Who said that?

A Dickie. And I asked him about the possibility of getting any pure goods, could they let us have any pure goods, and he said he would try, but it was difficult, that

back into your regular routine of lowering your voice. Is there any reason why you do that?

THE WITNESS: I don't know.

THE COURT: You spoke clearly then and your voice had quality. So please keep your voice up. Won't you try? Try hard.

Q Whom did you see her with, Mr. Verzino?

A With Mario and Ernie, Frankie Caravella, and once I think with Mr. Culhane was there, Jimmy Culhane.

Q Culhane is one of your customers?

A Yes.

Q Or was one of your customers, right, in this narcotics transaction with Mr. DeLutro? How many other narcotics transactions did you have with him?

MR. J.PANZER: Your Honor, may we have a side bar on this?

THE COURT: If you think so. I am sure you are worried about something, so let us hear it.

Stay in your seats.

(In the robing room.)

MR. J.PANZER: Your Honor, if this is going to lead us into a recital of alleged transactions prior to the beginning of this conspiracy, I must strenuously object, because I feel it is unduly harmful to the defendant

DeLutro, inasmuch as the jury comes acquainted with possible prior narcotics transactions, and it may do him irreparable harm.

THE COURT: I will not disagree with you for a moment, unless the jury is properly instructed, it will do a great deal of harm, not only to your client, but to any client. The issue is whether or not the Judge is constrained under the law, regardless of which side invokes the law, to meet the law's demands. The government insists on introducing this testimony, claims that it has a perfect right to do it under the doctrine which I have tried to explain to this jury. If I were asked whether I like it or whether I in my good judgment do not -- and the pronouncement in this respect is free of evil -- I would have to rush in and say that it is fraught with danger. But as a judge presiding, my views are not sought, and I am here to follow the law.

What does the government say to that?

MR. AMOROSA: We submit this evidence comes in just as it comes in against Pallatta, Mariano, Bolella, and Macchairola, who is not on trial, and the others, to show prior similar acts, a common scheme or course or pattern of conduct engaged in by Mr. DeLutro which carried over into the period charged. We urge that approach upon

your Honor. We also urge an alternative theory upon your Honor, under which this evidence can come in under the case law, that it is one continuous course of conduct by Mr. DeLutro identical with the conduct charged here. There are two separate approaches, and all you have to do is advise the jury that this conduct should be considered by them, thatthis testimony should be considered by them in connection with the defendant's intent or in connection with a course of pattern of conduct which is identical with the conduct charged here. That is really all I need to say.

MR. J. PANZER: May I answer it?

THE COURT: No. I intend to answer it. When I have attempted to advise the jury as to the reason this testimony goes in, you remained silent, and I took it that you acquiesced in the court's position. Now you are advancing an entirely different and highly dangerous position, and that is, the behavior pattern of the individual.

As I understand it, all of this prior testimony is only allowed to come in in order to show the existence of the conspiracy covered by the indictment, that it lends credence, it affords a contention that such a conspiracy did exist within the time embraced within the four

corners of the indictment. And that is all I understand is its purpose. Am I not right?

MR. AMOROSA: I think, Judge, we are saying the same thing in different words.

THE COURT: No, because I am going to say that they cannot conclude, even if theybelieve this testimony, that there was a propensity on the part of DeLutro, and, therefore, he must have done these things that were charged against him within the four corners of the instant indictment. That is the dnager of it. That is the thing I keep telling the jury, "You must not hold it against him." I am ready to tell them again, because this is getting to be detailed with regard to DeLutro, heavily involving him in a period preceding this, and I owe it to him and other defendants to repeat it.

You notice the earnestness of my voice and my great concern as I talk to them. These are lay people, and it is awfully hard for them to be given this weighty testimony and be told to keep it within the area that the judge directs.

Now, let us understand each other. Are you in agreement with me that the prior testimony -- I mean by that, testimony prior to the dates embraced within the indictment we have before us -- that that testimony goes in

only to support the government's position that there was in truth and in fact a conspiracy within the period alleged in the indictment?

MR. AMOROSA: Judge, yes, I simply say it in other words.

THE COURT: If my language is acceptable to you, that is the language I am going to use.

MR. AMOROSA: Under the rule, Judge, it would come in to show two or three specific things: One, the attempt of the defendant within the conspiracy charge; a course or pattern of conduct which is relevant to the conspiracy charge, which is what your Honor is saying in substance.

THE COURT: No, sir. I am saying -- I will repeat it in the charge, I repeat it now, repeat it every time I think it necessary to warn the jury -- that the testimony goes in only to show the development of the conspiracy embraced within the indictment, and for no other purpose.

MR. J. PANZER: May I ask a question? Assuming arguendo that DeLutro had been convicted of a prior conspiracy to sell narcotics, or of the sale of narcotics, or of the possession of narcotics, assuming that fact to be true, this witness, Verzino, could very well under the

questionings propounded by Mr. Amorosa, the United States Attorney, without DeLutro taking the stand and denying it, bring to the jury's attention that he had been convicted, and that certainly would be inadmissible under the rules of evidence, the way I see it.

THE COURT: So?

MR. J.PANZER: So I say that that testimony of prior alleged transactions, before this alleged transaction, or much before this alleged conspiracy, should be excluded entirely, and I feel that that is only for the protection of the defendants and giving the defendants a fair trial.

THE COURT: The comparison is weak, Mr. Panzer. A conviction is a judicial declaration; it is not the mouthings of a self-confessed criminal. He would not be allowed to touch upon any such thing as a conviction. That, I repeat, is a judicial declaration of guilt. Here we have the testimony of a witness, and he says, "I was dealing with this man, DeLutro, in my narcotics scheme and operations. He did this in connection with it; I did that in connection with it; it was a frequent event; and it all happened on dates prior to the date of the indictment in connection with defendants now on trial."

MR. J. PANZER: In 1960.

THE COURT: The law, as I understand it, makes

it admissible only for one purpose, and that is to show the development of a conspiratorial plan that advanced itself to the point embraced within the instant indictment, and also to show the verity or support, the testimony dealing with the existence of the conspiracy set forth in the instant indictment.

Now, that is my understanding of the law, and that is as far as I am going to go, to keep repeating it to the jury. It lends support to the conspiracy. They can either accept it or reject it. The weight from start to finish is up to them. The only reason I am letting this in is the law demands that I do so, but I must make it very clear it is only for the purpose I have repeated so many times, and for no other purpose.

MR. J. PANZER: Would your Honor add to that it is only admissible against Mr. DeLutro?

THE COURT: Only admissible against the person mentioned.

MR. EPSTEIN: On behalf of the defendant Bolella I ask for the declaration of a mistrial and the withdrawal of a juror. We have heard of a deal from Verzino, a deal with an individual we know not, and Bolella was later asked by Verzino, "Did anything happen?" And Bolella said "Yes." This was some time between

1962 and 1966. In addition, we also get into the record testimony that Bolella did not participate in the deal with Larry's son, whoever Larry's son may be. Now, Litwak v. United States and the Andersen case do not permit this. They have shown nothing here prior to the conspiracy charged in the indictment or subsequent to the period charged in the indictment. What you got here are instances where Bolella did not engage in criminal activity, but you got instances where Bolella engaged in a conversation with somebody we don't know, concerning what we don't know, and I would submit, your Honor, that that is highly prejudicial in view of the charges which are contained in the indictment. In United States v. Byrd in this circuit the same thing came up and the Court said you don't need any prior similar acts or statements if they believe the witness.

on the other hand, if they don't believe the witness, it adds nothing to the case. That was an income tax case, and the agents testified to things not set forth in the indictment. That is exactly what Verzino is doing here.

MR. AMOROSA: It is our position with respect to Verzino's testimony that Bolella did not want anything to do with the customer. I am not certain as to the

testimony he is referring to. But I believe that was elicited in a conversation with Verzino, something that Bolella and Verzino were talking about, which is totally admissible. The jury is entitled to when it is considering whether Verzino is telling the truth to look at the details of the testimony.

In addition to that, Judge, all of this testimony comes in because it corroborates what Verzino was saying and the government will have additional witnesses who will corroborate what Verzino is saying with respect to prior acts.

MR. GOLDBERG: Judge, may I be heard? You see the terrible problem that we are getting into now, even as a witness involved in this conspiracy relates prior similar acts? I just want to relate you to what Mr. Amorosa was suggesting, and that is calling somebody completely alien to this case, Manifidonia -- and the name has been mentioned earlier -- to the stand to testify about prior criminal activity engaged in by Bolella? It shows just a prior bad act by Bolella.

THE COURT: Mr. Goldberg, I hate to interrupt you, but nobody on the part of the defense has given me any authority to go counter to what my interpretation of the law commands me to do. You keep on telling me

that this may prove to be harmful, unless the jury clearly understands its limitation. But you don't show me anything which, in effect, says that what I am allowing in is error.

MR. GOLDBERG: Most respectfully, I wrote a letter to your Honor in which I cited the Goodwin case. All of these cases, your Honor, call upon the Court in weighing the prejudice against the relevancy to ask yourself, "Has the government shown a particular need or is this going to possibly pollute four weeks of work by bringing in this terribly dangerous proof?"

Dangerous foryour purposes, dangerous for our purposes, dangerous for Mr. Amorosa. There is a tendency sometimes on the part of prosecutors to overtry their case. I am saying that from personal experience myself.

THE COURT: I want to interrupt you again, only because I got your point, and I don't see any need for you to embellish it. That is the reason why I did say -- and Mr. Amorosa was perfectly correct when he held me to account, so to speak, when I did say what I did -- I asked you every time you are going to call a witness to go into prior acts, I want to be alerted and I want to make a ruling. There may very well come a time, and it is about to come, when I may very well say that what you have said just now,

Mr. Goldberg, is the test, and that, therefore, I cannot allow a surfeiting or a surplusage or a saturation of prior acts which will run away with the evidence that we are primarily concerned with, and that is the evidence with respect to the instant case. I don't think -- and I want you to know I am very worried about that -- I don't think that you have the right to call anybody and everybody who is going to testify and ask him about prior acts.

MR. AMOROSA: First of all, if your Honor is going to make up your mind on that question, I request that we brief this issue so that we can bring before your Honor hundreds of cases in narcotics cases where witnesses have testified with respect to prior similar acts. This testimony is not only relevant to show a common scheme and the intent of the defendants, but it will corroborate Verzino and Perna in part. One of these transactions was at the Trade Winds; it will corroborate their own testimony, Verzino's and Perna's in part. It will show the jury that Verzino and Perna are telling the truth. It goes not only to that; it goes to the common scheme and pattern. We request if your Honor wants to decide this matter, that counsel be permitted to file briefs in connection with this matter, and we will submit to your Honor, as I indicated, hudreds of cases that we have in

connection with this issue. It is a discretionary matter. We did in connection with Manfridonia's testimony submit a letter in which we indicated different cases.

THE COURT: Off the record.

(A discussion was held off the record and proceedings continued in the courtroom in the presence of the jury."

THE COURT: Ladies and gentlemen, there has been a discussion engaged in by Court and counsel, who have been most helpful. We have discussed one matter right now which has me a little worried, and we wish to go further into it. We may be here for a considerable period of time. I had told you we would go on to 5:30, but I have decided to let you go now.

Remember what I said about not talking about the case. And may I say to you that we are to meet tomorrow at 10 o'clock.

I would like you all to understand this: My own life, like yours, carries with it a great deal of sadness, as well as joy. That is life, unless you want to run away from life. We take the bitter and we take the sweet.

Among my earlier experiences was trying to hold down a job, and we found in thosedays that you had to be

on time or you were told to go, you lost your job. That was one of the habits that I developed.

There is nothing more annoying, not because it is in a sense to my office, which I regard is a high office, but it is a sense of habit, and that is to be late. Here I have made it my business with regard to my own personal affairs, with regard to other lawyers who have business before me, to be sure I am on time. The other day I was 15 minutes late, and I almost fell on my knees in apology, because I know what lateness means. People sometimes don't consider those things seriously anymore. But the Court has a right to direct in order that the Court should not give up its own plans, that everybody be here on the dot. I have to rise early; I have to plan how I am going to handle my day; I must make allowances for transportation and the troubles with transportation; I got to be mighty sure that I am here to meet you. It is no fun to keep lawyers waiting who have something to take up with me in chambers. I even forfeit my breakfasts in order to meet appointments. And to do that and then come running down here to find that one or two have not observed the Court's stricture, is something I do not wish. We are waiting for nobody. If you have not got what it takes to meet a jury date, I don't want you

on the jury. Please understand that. And if counsel should offend, I shall hold them to account. If any defendant offends, I shall hold that defendant to account. This is the Judge you happen to have struck. That is it. Be here on time, on the dot.

I want you in the box at 10 o'clock. If something happens with me in the sense that a lawyer comes in and wants me to hear an argument on some matter involving someone who is about to be sent out of the country, sent to an alien country, and possibly executed, and things like that do happen, I am going to listen to him and keep you waiting. But nothing short of thatis going to interfere. So, please, don't give me any aggravation; don't let me be upset. I think this is sufficient instruction, and it will be for all time.

Goodnight, ladies and gentlemen.

(Jury excused.)

THE COURT: I don't see any reason to keep the defendants. We will thrash this out in the robing room.

(Proceedings continued in the robing room.)

THE COURT: During the course of an off-the-record discussion about ten or fifteen minutes ago, I expressed myself firmly and with earnestness with respect to what I regard to be a challenge on an extremeley vital point

in this trial. It is so vital that I believe that as the Judge presiding I should proceed with extreme care with respect to prior acts. In the course of the discussion that is about to ensue, let us understand each other, so that every time I use the word "prior acts," I don't have tokeep defining it; I mean those acts which took place, according to the testimony adduced, prior to the dates embraced within the indictment with which this jury and this Judge and these attorneys are presently concerned. It is evidence from the testimony so far elicited that the prior acts are saturated with evil, that they show a continuous, uninterrupted course of conduct by the witness, participated in by certain defendants specifically named, and that they are even more incriminating than the very testimony dealing with the indictment with which we are concerned.

There is hardly a question propounded or an answer given that does not fall within the category of complete demonstration to the 'nth degree of the defendant named. In my humble opinion I have sought to allow that testimony into evidence and accepted it with the explanation that I have advanced, according to the transacript, to the jury on two separate occasions. So perilous do I regard that prior testimony that I have by voice, as well as

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by word, almost trembled that the jury should completely understand its purpose, its limited purpose, for fear that if they did not comprehend it completely and overwhelmingly, irreparable damage would befall not only the defendants named in the prior acts, but the defendants not named in the prior acts. I had to rule the way I did because I am constrained to declare that the law compels that ruling. Otherwise, I never would have permitted it. I still am of the opinion that that is the law. But I am equally convinced that the law says that Judge with respect to such prior acts has the discretion at any given time to say, in effect,"Halt! Enough!"

Feeling as I do that the heavy weight of the testimony and it sbody blows, so to speak -- take away body blows" -- I say effective blows to the jaw -- that characterizes pugilistically th weight of the testimony of the prior acts here -- feeling that those acts are heavy blows and that they even outweigh the totality of the testimony adduced in connection with the indictment before us, I fear me that all my explanations repeated to the jury now and hereafter will be unavailing insofar as preventing the jury from subconsciously being so smitten by the force of the prior acts that they are unable to avoid bringing the force of those prior acts into play

co such an extent that they add significantly to the weight of the testimony adduced with respect to the indictment with which we are concerned.

(Continued on next page.)

Off the record.

(Discussion off the record)

THE COURT: In other words, I fear that the jury, by reason of the overwhelming nature of the prior acts, may well, not willingly, but may very well have it rub off onto the testimony elicited with respect to the instant indictment.

There has been so much testimony on the prior acts that the prospect announced by the government off the record of calling additional witnesses with additional blows of the same weight has alarmed me for the reason already indicated, and I am seriously considering the possibility that I will exercise my discretion, in order to comply with the law's demands with regard to prior acts, direct that those demands have been fulfilled and that the time has come to call a halt.

I am going to ask counsel to advance arguments. Now, if they wish an additional time for briefs or memos of any kind, I owe them that courtesy, but I want that resolved before the next witness is called to the stand on prior acts.

We will complete the testimony of the instant witness with respect to prior acts on condition that it comes within the area I have indicated and that it does not violate

any of the regular rules governing the admissibility of evidence.

It is now 25 after five, counsel, and I have a plea in another matter coming up in a few minutes. I have had a pretty full day today, and you have witnessed it, and I think that we should hold this in abeyance and give counsel an opportunity to be heard at an early hour tomorrow, Mr. Amorosa.

MR. AMOROSA: Judge, I would like to leave the Court with this thought in connection with the proposed testimony of Mr. Manfridonia.

Nothing these witnesses say, Perna and Verzino, hurt these defendants any more than the testimony that they gave with respect to the instant indictment, because it is their credibility at issue. Whether they accept Verzino and Perna's credibility it is the same issue right down the line, whether they accept it with respect to the instant conspiracy or whether they accept it with respect to prior bad acts.

Perna didn't testify that he engaged in any prior bad acts, incidentally. There is not that much testimony in the record with respectto prior similar acts. Mr. Verzino has begun the true testimony with respect to prior similar acts, but his credibility, Judge, with respect to

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prior similar acts and with respect to what has been charged here is the same. It is only one witness.

THE COURT: If I may interrupt and anticipate, you are saying you wish to call additional proof in order to support the actual testimony given by the instant witness.

MR. AMOROSA: Exactly. Manfridonia's testimony of prior similar acts will corroborate, your Honor, and that's one of the purposes for prior similar acts.

THE COURT: Corroborate the prior similar acts the instant witness gave, not additional acts?

MR. AMOROSA: Will corroborate the testimony of Verzino and Parna, because Manfridonia's testimony, as indicated in a letter, will establish he himself received narcotics at the Cross County Shopping Center, that he himself received narcotics at the Tradewinds Motel. It will corroborate their testimony.

THE COURT: All right.

I just want to understand you

MR. AMOROSA: Yes, sir.

THE COURT: You propose to put on Manfridonia with the distinct understanding that he is only going to support the particular episodes which the instant witness has testified to.

MR. AMOROSA: No, sir. What I am saying is he will

testify to approximately three prior similar acts. They will not be prior similar acts already testified to by Mr. Verzino. They will be different ones.

Mr. Verzino was not there. It was Mr. Manfridonia taking narcotics from some of these defendants. We will offer that testimony to corroborate the testimony of Perna -- of Verzino, primarily, because Perna didn't speak in terms of prior bad acts. The only thing he said was that he was present at conversations at which Mr. Malizia -- all I am saying is please let us brief the issue, it is a crucial matter to the government, as it is to the defendants, and we would like to have an opportunity to bring to your Honor's attention the Second Circuit opinions on this matter so that your Honor could have everything before him before he decides.

MR. GOLDBERG: Could I say something? You have had a long day, but I just want to show you how this argument lifts itself by its own bootstraps.

You had admitted already other crimes under an exception that you found, quite properly, from the Court of Appeals.

Now, he wants to bring in a witness to corroborate what another witness has said whose testimony you let in only because it came within the rule of the Court

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of Appeals.

Now, this Manfridonia testimony will be offered not because of any exception delineated by theCourt of Appeals, because it is Verzino's testimony about other crimes that you let in because it comes within the Court of Appeals rule. Now he wants to bring in another witness who doesn't come within the guidelines laid down by the Court of Appeals, but now he ways only to show and corroborate what Verzino has said.

In other words, he is adding an additional link to what the Court of Appeals said is the proper way to get the proof in.

You ruled to my dismay, quite properly under the Second Circuit decisions. I don't like the Second Circuit decisions, but I am stuck with them. So be it. But having absorbed those blows, he now comes back to you and says, "Wait a minute. Now I've got you on point one, the Court of Appeals decision, you are going to have to let me have other links to corroborate."

THE COURT: What you have done is spelled out what I already understood, and I am much indebted to you. I want you to know I want much more from all of you, both sides, argument or authorities, whichever you choose, but we are not going to cut it off the way I was compelled to

cut you off because I want you to have plenty of time.

MR. GOLDBERG: You didn't cut me off. Thank you.

THE COURT: You will have plenty of time to develop whatever you have in your heads.

MR. AMOROSA: We are offering this not under some cockeyed theory, as Mr. Goldberg claims --

MR. CHANCE: He said cockamamie.

MR. AMOROSA: -- but under some other theory, and we will produce the authorities for your Honor.

THE COURT: Thank you.

MR. BLOSSNER: Judge, you asked me to remind you quite some time ago when we approached the situation. It seems to me we are now coming to the end of the line with Mr. Verzino and he is about probably to identify or attempt to identify my client, Mr. Soldano, in the courtroom.

I had asked you to reconsider the fact that this courtroom identification may be based on an improper and if so tainted photographic identification. I would ask you to inquire about this before that identification comes about.

MR. AMOROSA: Our position is identical to the position we took prior to trial. There was impermissible suggestive photographs which were shown to this man.

DIRECT EXAMINATION (Continued)

BY MR. AMOROSA:

Q Yesterday, Mr. Verzino, I think we were at a point when I asked you was this the first time that you had had a narcotics transaction with Mr. DeLutro.

Q Is that a question?

Q Yes. Was this the first time you had had a narcotics transaction with Mr. DeLutro?

A No, it was not.

Q How many prior narcotics transactions did you have with Mr. DeLutro?

A Several.

Q When were these narcotics transactions?

A 1961 or 1962, '65, and possibly in '64.

Q Did these narcotics transactions involve the narcotic heroin?

A Yes.

Q In what amounts?

A Kilogram amounts. TWo, three, five.

Q Two, three, five kilograms?

A To the best of my recollection, yes.

Q What was the quality of this heroin?

A It was pure heroin.

Q Did you sell him or did he sell you?

A He told me heroin once, and once introduced me to a group of men he was associated with that sold me heroin.

Q Did he know the reason why you wanted to be introduced to those people?

A Yes.

Q And how did he know?

A We discussed it.

Q Subsequent to the time that you picked up the heroin from Mr. DeLutro, did you go to the Cross County Shopping Center?

A Yes, I did.

Q Do you recall when this was in terms of the time you picked up the heroin from Mr. DeLutro?

A It was either in late November, after I picked up the heroin -- it was about late November.

Q Who did you go there with, Mr. Verzino, if you can recall?

A I went there with Mr. Malizia, and I believe Mr. Perna. I don't recall exactly if Mr. Perna was there.

Q Who did you meet at the Cross County Shopping Center, if anyone?

A I met Frank Pallatta, the man Donnie Boy, and other persons. I don't recall exactly who was there.

much property did you keep in your own name?

MR. J. PANZER: Objection, your Honor.

THE COURT: Objection overruled.

A None that I recall.

Q When did you plan to escape from Sing Sing?

A I think it was in June, May or June, I guess, 1970.

Q Did anybody ever tell you that you would not get 6-1/3 years to life imprisonment in the state court?

A No.

Q Has anybody ever told you that my office or the state prosecutor's office, the special narcotics office, would make a recommendation to the sentencing court as to what sentence you would get?

A No.

Q Have you been told that everything in your background would be brought to the attention of the sentencing judge at the time of your sentence?

A Yes.

Q Did you ever leave this country in 1973? Did you ever leave this country with a false passport?

A No, I did not.

Q What was your role in the Atlanta heroin conspiracy with Stassi?

A It was a go between and an interpreter at times.

Q Who intrdouced you to heroin, Mr. Verzino?

A Mr. Magnano.

Q When?

A Late '40s.

Q How old were you at the time?

A In my teens.

Q What?

A In my teens.

MR. E. PANZER: I am going to object. This has nothing to do with my cross examination. It was not even touched upon in my cross examination. It is obviously being brought up to prejudice my client.

MR. AMOROSA: I object to this.

MR. E. PANZER: Heknows it is improper redirect.

THE COURT: I can't have conference at the bench every single time there is a point. Most of these points many judges would allow to be discussed openly before the jury. I take you in the robing room so you can talk to me off the record. I don't see that there is anything objectionable here.

MR. E. PANZER: He is talking about 1940, 35 years ago. There was not one question in cross examination on that. This has nothing to do with this case. It is

obviously done for no other reason than to prejudice my client, and your Honor, I have no alternative but to ask for the declaration of a mistrial at this point, because he had no reason to ask that question. He said my client introduced him to drug in the'40s. What has that to do with this case?

THE COURT: It has a great deal to do with this witness, his background, what he can tell you with regard to narcotics. It is relevant with regard to the first time he met any one of these defendants in connection with the purchase and sale of narcotics. He has got a right to say, "I met him when I was nine years of age." "He has helped me go through school." Whatever he wants to say. He as a right to show his connection with each one of these defendants, from the time he first met them .

MR. E. PANZER: This is redirect.

THE COURT: Objection overruled.

What is your birth date?

THE WITNESS: April 22, 1932.

Q You just certified to a certain transaction with Mangano. When did it occur?

A It was not a transaction.

THE COURT: What was it?

THE WITNESS: He showed me heroin.

THE COURT: Is that it?

THE WITNESS Some conversation. It is a long time ago. He said it was heroin.

THE COURT: Do you remember the conversation?

THE WITNESS: No, I don't.

Q When did that occur? Was it 1940 or the late 1940s?

A Late 1940s.

Q You testified in response to some questions by Mr. Blossner about a fellow by the name of Tony Christopher. When did you first hear the name Tony Christopher?

A Some time in the winter of 1974.

Q And from whom did youhear it initially?

A Another the agents or another informer.

Q How did it come up, Mr. Verzino? In what context?

A I was asked if this man Tony's name could be Christopher. I said I didn't know.

Q What man?

A The man I knew as Tony Soldano.

Q Did you speak to anyone with respect to establishing his last name?

A Yes, many people.

Q And whom were you referring to when you just said

ordinary course of business, and it was in the regular and ordinary course of business --

THE COURT: I will leave it open. If you can show me authority for it, I will reconsider it. Right now, I am against it and sustain the objection to it.

Now we come, gentlemen, to something else that you have a right to have disposed of, and I shall attempt to do it, if you will bear with me.

Your answer to that silenly is "Have we any alternative?"

Let's go to prior acts.

The government wishes to introduce evidence supporting the testimony already elicited with regard to prior acts. That has been bitterly fought by the defense. The government has met that bitterness by its own forceful arguments. It is not an easy question to resolve, but this is our resolution.

We are satisfied that the rule with regard to prior consistent acts does not warrant proof beyond a reasonable doubt. The prejudice that would result to a jury by allowing such a rule is enormous. Conceive of a case that is weak, where the governmen wants to show that there was a conspiracy, and the testimony does not hammer home many convincing facts with regard to the conspiracy.

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I am not saying that is true here.

Then all the government has to do to bolster that testimony is to refer to prior consistent acts and develop them with a thoroughness that entails even a third-rate point beyond doubt. That alone would resule in the jury, no matter what instructions were given to the jury, to allow that effectiveness to carry over into the evidence dealing with the indictment, and it would bolster it, say what you will.

The cases hold distinctly that must not be done. We have witnesses on the stand that have gone into prior acts with a clarity, with a precision, with a thoroughness, the believability of course all up to the jury, but it is in the record, they have gone into it, and the government wants to cement it by hammering it home.

The law says "Hold it. Enough. That you cannot do, and that you must not do, because the prejudice that will result far outweighs what is sought to be accomplished."

Accordingly, we observe that the amount of prior crimes evidence that is admissible is certainly also within the trial judge's discretion. At any point the Court may determine that the proof to be introduced is "largely cumulative;" and that testimony regarding these prior incidents

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adds little, if anything, to a revelation of the development and background of the conspiracy.

United STates against Byrd, 352 F. 2nd 570, 574-575, Second Circuit 1965.

Just listen to this language in Byrd:

"[T]he scope of [the Court's] discretion does not include every offer of a prior similar offense....which may contribute something to a showing of [development of conspiracy] in the Government's main case. Where the prejudice is substantial and the probative value, through the nature of the evidence or the lack of any real necessity for it is slight, its admission at that stage may be held to be an abuse of discretion."

1 am That is at page 975.

"Such a determination naturally is made on a case-by-case basis. Nonetheless, as in Byrd, the trial Judge is permitted to conclude at a certain point that the probative value of the evidence is so attenuated that the evidence is merely cumulative."

And the refer to the case at 544-575.

The transcript already reveals our concern last Monday with the dangerof overloading pior acts. We now find what we regard as supporting in the case of United States v. Bradwell, 388 F. 2d 619, 622. That is a case of one of the great Judges, that Bradwell case, Judge Weinfeld. I adopt what he says. In fact, I take heart in that, and before I was made familiar with that case I indicated on the record of this trial the reasons, not as well put by me, but the reasons which Judge Weinfeld set out in the Bradwell. And what did he say? He cautions with regard to receipt in evidence of "other-crimes-evidence thrown on scales already heavily tipped against the defendant." And the Court of Appeals said in 388 Fed 2d, Judge Friendly writing for the Court, Relating to this consideration is whether the government has a'real need' for the evidence at a certain stage of the proceedings.

"A comprehensive analysis of the question is

considered in State v. Goebel, 36 Washington 2d 367 (1950), cited by the Bradwell Court:

"Prior crimes evidence should be excluded where the Trial Judge is convinced that its effect would be to generate heat instead of diffusing light... (or) where the minute peg of relevancy will be entirely obscured by the dirty linen hungupon it. This is a situation where the policy of protecting from undue prejudice conflicts with the rule of logical relevance, and a proper determination as to which should prevail rests in the sound discretion of the trial court."

That is to be found at page 379.

"In sum, the Court may halt the introduction of prior crimes evidence where there is no 'actual need' for the other crimes evidence in the light of the issues and the other evidence available to the government, but there is a chance that the jury will probaby be roused to overmasteringhostility."

See United States v. Brettholz, 485 F. 2d 483, 487 (2d Cir. 1973).

So the Court halts the government now with regard to a consistent acts with the distinct understanding, however that it he government has testimony of prior consistency relating to defendants other than those already revealed

by such prior crimes testimony, the Court will allow it, only to that extent. In other words, your prior crimes testimony dealt with certain of these defendants now on trial. If you have any additional testimony that relates to defendants not mentioned up to now in that prior crimes testimony, I will allow it under as to that, and now beyond that.

Do I make myself clear?

MR. AMOROSA: Yes, sir.

THE COURT: That is it. That is the ruling of the Court, and I know you will abide by it.

MR. AMOROSA: May we go off the record for a second?

THE COURT: Sure.

(Off the record discussion had.)

MR. J. PANZER: Your Honor, it may very well be the defendant whom I represent, Anthony DeLutro, who will take the witness stand and he will deny the evidence that was broughtout by Verzino's testimony, that Verzino had dealt with him in 1962, 1963 and 1964 in other transactions. I think that on the record I made objection to Verzino's testimony and I move it for the withdrawal of a juror and a mistrial. I believe that Mr J. Goldberg did the same thing as to his client. I think for his client, Mr. Epstein did the same thing. Now, your Honor indicated that if any

1973 and February of 1974, when you were surveilling Mr. Verzino, did you observe him in the presence of Mr. Lucas?

A No, sir.

MR. HOFFMAN: I have no other questions.

THE COURT: All right.

Anything further?

Very well.

Sergeant, thank you. You are excused.

(Witness excused.)

THE COURT: Next witness.

PETER SCROCCA, called as a witness on behalf of the government, being first duly sworn, testified as follows.

THE COURT: Mr. Witness, I say this to all witnesses. Please remember you are giving testimony under oath, and will you straighten yourself, like I do, so that these people who are the jury in this case can hear every word as it comes out of your mouth?

THE WITNESS: Yes, your Honor.

THE COURT: In the second place, please, please, please, just answer the question that is put to you. You are not here to tell us all you know unless it is asked for.

Do you understand?

THE WITNESS: Yes, your Honor.

THE COURT: If they want information, let them ask for it.

Have you got it?

THE WITNESS: Yes, sir.

THE COURT: Wherever you can answer "yes" or "no," please do so.

MR. AMOROSA: May I proceed, your Honor?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. AMOROSA:

Q Will you state your name again, sir?

A Peter Scrocca.

Q By whom are you employed?

A Drug Enforcement Administration.

Q How long have you been so employed?

A Going on fourteen years.

Q In what capacity are you currently employed with them?

A I am a group supervisor in Miami, Florida.

Q How long have you been so employed?

A Approximately five years in Miami.

Q Prior to that, how were you employed by the Drug Enforcement Administration?

A I was a special agent in New York.

Q New York City?

A Yes, sir.

Q Where were you born?

A Bronx.

Q What area of the Bronx?

A Morrisania section.

Q How long did you live in that area?

A Approximately seventeen years.

Q After you moved away from the area, did you continue to frequent it?

A Yes, sir.

Q How often?

A Periodically. Sometimes a couple of times a week. Sometimes every two weeks.

Q When did you become an agent, and do you recall the year?

A 1963.

Q Do you know Michael Carbone?

A Yes, sir, I did.

Q Do you know Macchiarola?

A Yes.

Q Do you know Joseph Magnano?

A Yes.

Q Do you know Frank Pallatta?

A Yes, I do.

Q Richard Bolella?

A Yes.

Q Anthony Verzino?

A Yes, sir, I do.

Q Where do you know those people from, Agent Scrocca?

A From the neighborhood that I grew up in.

Q Did they also grow up in that area?

A To the best of my knowledge, yes, sir.

Q When did you first meet these people?

Give us a rough estimate, if you can.

A I can't tell you exactly. As a child.

Q What other names does Frank Pallatta go by besides Frank Pallatta?

A Bolot, J.P., J.B., and I have heard him referred to as "Nose."

Q With respect to Carbone, Macchiarola, Pallatta, Bolella and Magnano, have you ever seen those people together on occasion?

MR. EPSTEIN: I object, your Honor. I would like to have it more specific.

THE COURT: Objection overruled.

Have you ever seen them together?

THE WITNESS: Yes, sir, I have.

THE COURT: If he says no, that's the end of it. If he says yes, that gives the interrogator an opportunity to develop it.

Go ahead.

Q How many times have you seen those people together?

A On numerous occasions.

Q Where?

A Various locations in the particular neighborhood that we are speaking about.

Q In what period of time?

A Since as a child until -- up until several years ago.

Q Now, with respect to --

THE COURT: Wait a minute. Hold it, Mr. Amorosa.

Are you saying, Mr. Witness, that you saw these persons together from time to time? Is that what you mean?

THE WITNESS: Yes, your Honor.

THE COURT: Do you know the expression "they hang out together," do you know what that means?

THE WITNESS: Yes, sir.

THE COURT: Would you say that this group hung

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out together?

THE WITNESS: Yes, sir.

THE COURT: As young people and as adults?

THE WITNESS: As adults.

THE COURT: So that in essence it means when you came upon them almost invariably they would be together. Is that what you're saying to us?

THE WITNESS: Several of them, yes, your Honor.

THE COURT: And by several, who do you mean? Repeat the names again.

THE WINTESS: I have seen several together, not always the same personages together.

THE COURT: All right.

So when you saw -- give us the names of the groups you saw. Who was in the group that you saw quite frequently? Who was in that particular group?

THE WITNESS: I have seen Macchiarola and Carbone together on many occasions.

I have seen Magnano, Pallatta and Bolella together on several occasions.

And I have seen the two groups together on several occasions.

THE COURT: All right. That answers it. Next

question.

Q Did you ever see Verzino together with Pallatta?

A Yes, sir, I did.

Q While you were an agent?

A Yes, sir.

Q While you were conducting surveillance?

A Yes, sir.

Q Would you tell us when, roughly?

A On July 4, 1963, I was conducting --

MR. GOLDBERG: I object, and ask for a side bar in line with the ruling your Honor made during the recess.

THE COURT: My inquiry of the government whether the government had anything else in mind from this witness other than the essence of what he has testified to up to this moment?

MR. AMOROSA: Yes, sir.

THE COURT: Very well.

Will the jury take a short recess?

Take the jury.

(Jury excused.)

(In open court - jury not present.)

THE COURT: Mr. Goldberg, what's on your mind?

MR. GOLDBERG: May the witness be excused?

THE COURT: Surely.

(Witness excused.)

MR. GOLDBERG: Prior to the time that this agent was called your Honor ruled that we had enough on the issue of other crimes. It is one thing for this agent to testify he saw Verzino and Pallatta together, it is perfectly all right, but to say that he saw them in the course of a surveillance gets before this jury --

THE COURT: I got it.

Mr. Amorosa?

MR. AMOROSA: Judge, Verzino testified he had narcotics dealings with Pallatta in 1963. This agent -- and that testimony came into the record -- will put Verzino and Pallatta together in 1963 in a meeting that corroborates Verzino's testimony.

This agent will not testify to additional prior similar acts.

THE COURT: I don't want any evidence on surveillance. If he says I happened to see them at a meeting, that's all right.

MR. AMOROSA: That's what he will testify to.

THE COURT: Mr. Goldberg is right. I don't want any innuendo of prior acts.

MR. AMOROSA: He was working surveillance at the time. We offered the testimony --

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THE COURT: What difference does it make, unless you want to take advantage of the surveillance with the jury, which I won't permit. What difference does it make if his testimony is going to be "I saw at a certain place so and so"?

Now, if that's questioned, if that is attacked, then you might have the right to show how he, the witness, had to be there.

MR. AMOROSA: We have no particular need to show he was working surveillance at that time, but we do submit that the meeting corroborates Verzino's testimony.

THE COURT: All right, he saw him at a meeting place. Isn't that the size of it?

MR. AMOROSA: Yes, sir. We will leave it at that.

THE COURT: So your fears, you can forget about it, because he assures us he is not going to bring out any surveillance or anything like that.

MR. GOLDBERG: With all due respect, your Honor had ruled on this and --

THE COURT: There is no prior act being even intimated here.

MR. GOLDBERG: The witness testified on at least on occasion to surveillance. I had thought, in light of your Honor's ruling, Mr. Amorosa would clean that up with the

witness before he took the stand, but Mr. Amorosa brought that out quickly, and I quite frankly wasn't alert to it because I assumed once you had ruled you wouldn't allow prior crimes in. Mr. Amorosa would have the sense not to bring out that the agent was on surveillance and get before this jury the kind of poison he did, so I would ask for the declaration of a mistrial with respect to my client or short of that, if you should deny that, then at least strike that from the record and ask the jury to disregard it.

It seems, when you make a ruling counsel has an obligation to then alter their plans to conform to the ruling instead of plowing ahead.

MR. AMOROSA: Can I respond to this?

THE COURT: Certainly.

MR. AMOROSA: This is a red herring. Mr. Goldberg is trying to overwhelm your Honor with words. There is nothing here. We are simply corroborating the testimony of Verzino. There is no prior bad act we are introducing here. This man saw Verzino with Pallatta. He corroborates Verzino's testimony he was with Pallatta. This argument is a lot of words but nothing but words.

The fact he was working surveillance is immaterial That's what he was doing at the time, surveilling Verzino. He saw Verzino with Pallatta. This is an attempt to overwhelm your Honor with words and nothing more.

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We are simply corroborating the testimony of Anthony Verzino that he met with Pallatta in 1963.

Are we going to be restricted from proving our case in this courtroom?

MR. GOLDBERG: Can I answer this, this fighting words declaration directed to your Honor, are we going to be prevented from proving our case, as though someone here, including the Court, is in some way obstructing his efforts to prove the case.

He has now taken heart with respect to your Honor's ruling on the Manfridonia aspect, so he is going to come to your Honor and say, "I am not proving other crimes; I am merely corroborating what Verzino has said."

THE COURT: Come into the robing room.

(In the robing room.)

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

There has been an off the record discussion, which I hope will be fruitful to both sides, and I now ask counsel to be good enough to place upon the record the essence of what they have expressed off the record.

MR. GOLDBERG: All right.

I made the objection, so should I be heard first?

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THE COURT: Whichever you wish.

MR. GOLDBERG: I have asked for the withdrawal of a juror and the declaration of a mistrial on the ground the proof adduced through this agent's contravenes your Honor's ruling there should be no more proof with respct to prior similar acts of those people already implicated in prior similar acts through the testimony of Verzino and Perna.

With that rulin, in mind, the Assistant has attempted to circumvent that ruling by saying that he is not offering proof on prior similar acts, but he is merely seeking to corroborate Verzino's testimony with regard to prior similar acts, and to the extent that this Assistant, despite your Honor's ruling has injected before this witness on two separate occasions, two questions the fact this agent was on surveillance duty at the time he made these observations I believe, your Honor, contravenes your Honor's ruling and if your Honor's ruling as I do believe was grounded on the belief such a ruling is necessary to do justice in this case, I submit that this line of inquiry by the Assistant undertaken in contravention of your Honor's ruling offends due process and a fair trial to which my client is entitled.

So, I press my objection for the withdrawal of a juror and the declaration of a mistrial.

MR. J. PANZER: May I be heard, your Honor?

THE COURT: Certainly.

MR. J. PANZER: In behalf of the defendant DeLutro, I move for the withdrawal of a juror and the declaration of a mistrial on the following grounds:

That even though the defendant DeLutro was not mentioned as being surveilled in the 1960s, the fact that he is implicated in an indictment with these people Bolella, Pallatta and Magnano in a conspiracy indictment, and the fact that it was brought out on direct examination thatthe other defendants, Bolella, Magnano, and Pallatta were under surveillance so inures to the prejudice of my client because he is charged in the same conspiracy that he cannot get a fair trial anymore because the surveillance angle has come before this jury and these are my reasons for the motion for the withdrawal of a juror and the declaration of a mistrial.

MR. E. PANZER: I join in Mr. Goldberg's application and I would like to add this in addition as it applies specifically to my client, Mr. Magnano.

We are trying a case that involves a conspiracy that runs roughly from 1973 to 1975. Mr. Amorosa, in an attempt to buttress up his witnesses, has gone back to the '40s and the '50s about Mr. Magnano. Now he's got a meeting back in the '60s.

So what this jury -- now he's got surveillance,

and we have an intelligent jury, I have watched this jury, there are very bright people. When he uses the word "surveillance," they know there is an investigation going on about another crime.

In effect, what he's done with this jury is he has put my client on trial for two different sets of crimes. One in which he is charged in this case, one in which he is not charged at all.

I say, under those circumstances the cumulative effect of everything that Mr. Amorosa has done with these similar acts is to deny my client a fair trial, and I know he is zealous, but there is only so far you can go and I move for a mistrial.

MR. HOFFMAN: The defendant Lucas joins in the motion.

MR. EPSTEIN: The defendant Bolella also moves for the withdrawal of a juror.

This witness testified he has been in Miami the last five years. IT stands to reason whatever he is testifying to must have occurred either in 1970 or prior to 1970, which of course is before the period set forth in the indictment.

In addition to which he has testified he has known these people since he was a boy. He has seen Pallatta, Magnano and Bolella together.

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THE COURT: I heard the testimony.

MR. EPSTEIN: What possible significance is it to the jury, unless they put it in their own mind, which they can do by the reference to surveillance, that there was an act on their part calling their conduct to the attention of the officials? That is unfair.

Also, he allegedly observed them twelve years ago, there apparently would be some 3500 material on it, but we have received none in connection with his testimony, although at that time he was an agent, according to his testimony.

THE COURT: Anyone else?

MR. BLOSSNER: I so move on behalf of the defendant Soldano. They may say this witness has said nothing about the defendant Soldano, if your Honor please, but this witness has bolstered an inconsequential piece of testimony of a major witness against my client. He has bolstered a small point of an alleged meeting or an alleged knowledge back in 1963 which tends to say the government will establish even the smallest part of Mr. Verzino's testimony, so all the major parts of his testimony must be true.

I make this motion even though it was addressed as to Mr. Goldberg's client, because unfortunately the U.S. Attorney has not heeded your Honor's instructions.

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When your Honor had instructed the U.S. Attorney to stay away from the area of identification of my particular client I used the words when he plowed right into it, he has let the cat right out of the bag.

He has done so again, your Honor, and this has built up irreparable damage within the jury. This jury cannot be instructed now. It is beyond reclaim. That's why I make this motion on behalf of the defendant Soldano for an inconsequential thing that is said by the witness as to Mr. Goldberg's client.

MR. J. PANZER: I am sorry, Mr. Chance. I'm sorry.

MR. CHANCE: If your Honor please, I join Mr. Goldberg on the motion for a mistrial on the further ground to admit this against William Chapman, and also the introduction of the evidence, will be cruel and inhuman, and I say that it is not possible for Chapman to get a fair trial because of the minimal evidence that has been produced against him, and I join in the motion.

mR. LANG: Your Honor, on behalf of John Gwynn I move for a mistrial.

MR. J. PANZER: If your Honor intends to give an instruction to the jury, in an attempt to cure this most flagrant error on the part of the U.S. Attorney, I most

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respectfully say that I know your Honor can give a very, very fair instruction, but we have to take the minds of the jury, no matter how intelligent they are, can they separate the wheat from the chaf, so to speak? There is a wealth of evidence in this case. It has been going on for three weeks. I as an attorney for one of the defendants supposedly trained in trial and law, am hard put to remember every piece of evidence in this case. What can we expect from a lay jury, no matter how intelligent, to separate out the poison engender by the word "surveillance"?

No jury in the world can take it from their minds no matter how good your Honor instructs.

THE COURT: Mr. Amorosa remained silent while you spoke. We want to give him a chance to respond.

MR. AMOROSA: Your Honor permitted the government to elicit from Verzino prior similar acts with respect to the defendant Pallatta. That came in over permission. There was a red flag at the time and your Honor granted the government permission to elicit this testimony from Verzino, which went back to the beginning of the 1960s, in I believe 1961, in that area, but certainly 1963, the period in issue here.

What we are offering this witness for is to corroborate the witness Verzino with respect to that, with respect to his prior similar act testimony against the

defendant Pallatta.

We do not offer this witness to show additional prior acts on the part of Pallatta. We simply offer it to corroborate Verzino, corroborate something your Honor has already permitted us to put in the record.

As to surveillance in this case -- and incidentally, there is 3500 material with respect to this -- I showed it to Mr. Goldberg, I only have one copy, the copy in my hand right now, it is 3516A, which is a report of this agent in which is reflected the meeting that he is describing now, and I will show it to Mr. Epstein.

Of course, I intended to turn it over to counsel after the witness was done though Mr. Goldberg has seen it. Nothing need be cured. There is no testimony here of prior similar acts at all. All we have in this record so far, and if this witness is permitted to testify fully, is that Verzino and Pallatta met in a certain restaurant at a certain time in 1963, thereby corroborating the testimony of the witness Verzino.

It is the government's position that we have a right to corroborate the testimony of our leading witnesses.

What Mr. Blossner said is absolutely right. We do intend to argue it to the jury based on this meeting and other surveillances that because Verzino was telling the truth

at this time we ask you to believe Verzino with respect to all the other matters.

We submit that a totally proper argument, and the government is permitted to corroborate the testimony of its leading witnesses in any way it can legally, and a meeting, a meeting surveilled by an agent, is certainly one of those things, one of the ways in which the government can legitimately and legally corroborate the testimony of one of its witnesses.

They can bring it out on cross examination of this witness that it was Verzino who was being surveilled at the time, and Pallatta walked into the restaurant. They can bring that out. It is reflected in the 3500 material. This has nothing to do, as indicated, Judge, and it is our position we have not violated your Honor's order we not introduce any additional prior similar acts.

Again, and I repeat again, and I emphasize, this has nothing to do with prior similar acts. All it is is a meeting. The jury may say to itself, "Well, Verzino testified to meeting Pallatta back in 1963. Perhaps Verzino was telling the truth at that time when he testified to that. Perhaps this man is entitled to credibility."

Somebody made a statement here, I can't remember who it was, that we brought out that Pallatta was

under surveillance by this witness. We didn't bring that out. He was working surveillance. He was working surveillance on Verzino. All that would have come into the record. Pallatta walks into the bar, and he joins Verzino and another individual in conversation. And that's all it is.

We offer it simply to corroborate, and that's all I have to say with respect to this, and I am still of the position we have done nothing to violate your Honor's ruling with respect to prior similar acts.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: On the record.

You said, and I merely remind you, because later on you may denounce yourself for not having covered it -- do you wish to say something with regard to your statement to the Court about the difficulties of a trial? Do you wish to say anything about that?

MR. AMOROSA: I think I indicated that a few minutes ago.

THE COURT: You didn't put it on the record.

MR. AMOROSA: I am sorry, I wasn't aware it wasn't on the record at the time.

I want to apologize to the Court for my statement right before we came into chambers that there was

a possibility we were restricted from proving our case in this matter.

I attribute that, and I hope to attribute it in any case, to an ever-zealousness on my part. We do at this point believe your Honor is giving us a fair trial in this matter, and once the ruling on Manfridonia was made, Judge, the record will reflect we indicated that we would abide by it.

We did indicate we would like to submit a memo to your Honor but there is nothing wrong with that, as your Honor knows.

We will abide by the prior similar acts ruling as we will abide by any ruling your Honor makes in this case and I apologize.

THE COURT: I accept the apology because I know, and said so off the record, that it was not intended. It was a loose statement that was unwarranted certainly in the presence of the jury. That's all I really care about, that the jury should have regard for all of us, you as counsel for the prosecution and you gentlemen as counsel for the defense, and I think that they have seen the Judge has tried in his own limited fashion to run this with some degree of order and earnestness.

Now, I am about to make a ruling, and I see no

reason to listen to any further argument because I've got the essence of your argument well in hand.

I'm afraid that the learned Assistant failed to pay strict attention to one insistent comment by the Court. I said that I was satisfied after a reading of the cases that with respect to prior acts they were not to be embellished as though the government had the obligation to prove them beyond a reasonable doubt.

As I understand the cases, once there is a certain amount of evidence which is rather substantial in nature to be weighed by the jury as to prior acts in order to show the continuance of the conspiracy embraced within the indictment that meets what the law entitles you to receive.

When I said you are not supposed to prove that beyond a reasonable doubt, meaning the prior acts, that is exactly what your pre-confessed statement may be construed as accomplishing. You say, "No, Judge, this is merely being offered to support or corroborate Verzino," but where a piece of testimony is capable of both, one must go.

Your corroboration must go in order to uphold the equally sanctified proposition of law that you are not to nail down Verzino's testimony with regard to prior acts.

That's the reason why it is unacceptable.

The cases distinctly hold, and I might say to

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you I have consulted, since I have never been the kind of man that thinks that he cannot be made more wise by consultation-- I have consulted with the most learned minds in this court and they said, "You have overdone it," and I place it on the record, "in receiving so much testimony."

I don't think I have. And so the amount of testimony that can be received is limited by the cases because as counsel keep saying -- prejudice, prejudice, prejudice, has crept into this case, and I am supposed to guard it so that that unwarranted prejudice does not come to pass, and I fear that unless I watch it it will tip over and destory the whole purport of receiving that evidence into the record in the first place.

It is a discretionary matter after all, but where a witness, such as you call to the stand, without batting an eyelash, and I said so on the record, heaped a veritable cataract of disclosure -- every word that came from his lips was a damning piece of evidence against the defendants on trial -- you have got all of that clear with regard to the very indictment before us, and yet you were allowed under the law to go back to a period before the indictment, in order to show that the indictment refers to a conspiracy that did in fact come to pass.

But the right to do so is limited and it is no

answer to say to the Judge that "I want to corroborate Verzino," when you know that that deals with a date that antedates the indictment.

And so, I cannot possibly allow it in, and I can't even allow a word such as "supervise" in because it has one meaning to this jury, and it adds another blow to the defendants who have already been damned by this avalanche of testimony.

I ask the government in its zeal to fulful its mission, and I say again, as the record reveals, there is no purposeful intent, but that's no answer, really, when the damage is done. An accident happens and a person's leg is off, and to apologize carries very little.

And so the fact that you don't intend to do something, and that isn't a Macchiavelian maneuver, is not the complete answer. I conceded that there is no such spirit by either side. I have said it, and I have said it in complimentary fashion repeatedly before the jury, and I have been glad to be able to say it, but if nevertheless, with the most holy of motives, the jury is prejudiced, which is the hue and cry of all the cases I have examined on this score -- be careful, Judge, lest you allow this prior testimony to prejudice the jury -- the testimony of prior acts, I mean -- watch it. There it is as clarion call, and according to my lights

I figure that there has been enough evidence already on that, and that I must not yield to th. government's zeal, and even though you gave me overwhelming evidence, including a confession, so to speak, of these prior acts, I would have to exclude it because of the enormous damage of prejudice that it would do to the jury.

And so, because of my understanding of what the cases have held I came to the conclusion that there was sufficient on that score, and I warned the government in making the ruling this morning that it must not go back to that field. I should think that whether the Judge errs or not the government is duty-bound to abide by the Court's determination. I even said this morning, and I say it again, that if the government can show me where the Court has over-emphasized its stricture, and I can be enlightened by the submission of additional authority, that possibly I did not see, and I find I have erred, I would be the first to rush in and correct my own error. There is no pride of authorship. Most of us are groping and we say it without equivocation, we grope in our hope that we will give a fair trial.

In sum, then, while the government wants this evidence to corroborate Verzino, it also may be considered as accentuating or corroborating or strengthening the evidence

already adduced with regard to prior acts, and that I will not permit. One has to yield. Therefore, the attempt to corroborate Verzino must step aside because on balance it has the lesser weight.

Now, that's it. I don't know in my own mind at this moment just what I should say to the jury with regard to surveillance. You said outside, before we came here, Mr. Amorosa, that you would be content merely to bring out from this witness that on a certain occasion he happened to see at a certain building or at a meeting or in some general language if you think you need it in order to substantiate what he's already said with regard to who he saw at that meeting, if it includes some of the defendants. That is as far as I will let you go, if you think you need it. But I think the word surveillance must be removed, and I think that if this meeting, on second thought, does not relate to a prior act, and you don't need it for identification because he has already spoken of that identification, I would say that I would be inclined to even keep that out.

What do you think?

MR. AMOROSA: Judge, I elicited from the witness that Verzino was under surveillance, not Pallatta, first. It was not Pallatta under surveillance. Verzino was committed in 1966 for crimes which occurred in 1963. The jury should be

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aware, or won't be surprised if it was made known that Verzino was under surveillance in 1963.

THE COURT: This relates to Verzino's testimony as to prior acts.

MR. AMOROSA: Yes, sir. I was making that point, that we can clear up the surveillance business. There won't be any testimony that Pallatta was under surveillance in 1963. Verzino was under surveillance in 1963.

THE COURT: This will be construed as a corroboration of Verzino's testimony.

MR. AMOROSA: He will testify simply he saw Pallatta join Verzino at a table for a few minutes and then leave.

THE COURT: What date was that? That antedates the date of the indictment?

MR. AMOROSA: Yes, indeed.

THE COURT: What is the purpose of bringing that meeting in? What do you want to accomplish by that?

MR. AMOROSA: We would like to corroborate Verzino's testimony as indicated.

THE COURT: That's your whole purpose?

MR. AMOROSA: Yes.

THE COURT: Then that goes. The rule I have laid down excludes it. That's the end of that.

MR. GOLDBERG: May I point something out to your Honor, that has been missed here, and it is our responsibility.

Do you recall when Verzino was on the stand Mr. Amorosa very carefully drew his attention to the testimony before Judge Weinfeld in 1966, and he said to him, "Remember, Mr. Verzino, you were asked questions about who your sources were in 1963, and you took the Fifth Amendment?"

Now, having laid that before this jury about his sources in 1963 it is not without understanding that Mr. Amorosa was seeking to show the relationship of Verzino and Pallatta not in 1961, 1968, but '63.

Don't you see, your Honor, there is an attempt here, and a clever one, to get before this jury that in 1966, when he lied before Judge WEinfeld, he took the Fifth Amendment on who his sources were in 1963. Then he brings this agent in to say that Verzino and Pallatta were together in 1963.

In other words, that makes it even more agregious. It is a perfect attempt here to pull these two things together.

Now, your Honor, it seems to me that he didn't mention that Verzino was under surveillance. He asked the agent whether the agent was on surveillance duty. To simply not mention surveillance at all really puts me at a

[illegible] to [illegible]
disadvantage.

First, I ask for the declaration of a mistrial. If that is denied --

THE COURT: It is denied.

MR. GOLDBERG: All right.

Then I think perhaps Mr. Amorosa should point out that only -- or the government should represent in fairness that only Mr. Verzino was under surveillance and not Mr. Pallatta. Otherwise, it appears that from his questions they were both under surveillance, and what would the 1963 Judge Weinfeld testimony, the two taken together, have but a poisonou effect on a fair trial.

THE COURT: What would you have me do? I will be glad to take your suggestion. I am prepared to tell the jury that there was some attempt to bring in the word "surveillance," which I find has no place in this case, and I want them to disregard that word completely, and that's the end of that.

MR. GOLDBERG: My suggestion is, in line with what Mr. Amorosa said, to instruct the jury that the government has advised the Court that while there was use of the word "surveillance," at a time when Verzino and Pallatta were seen together, the agent was on surveillance duty only with respect to Verzino and not Pallatta. He said that. Is that

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right?

MR. AMOROSA: At that time it is accurate, but a few weeks later -- Judge, we don't want a represention in the record Pallatta was not under surveillance at all. We have no problem with the declaration at the time Verzino was the person under surveillance.

THE COURT: I don't want to cut you gentlemen off, but it seems to me we will be ahead of it if we will say that after a discussion the question is withdrawn. That's it.

"Therefore, you will remember, ladies and gentlemen of the jury, anything incorporated in a question is to be disregarded completely. There is no basis for it, and, therefore, the Court allows it to be withdrawn."

MR. GOLDBERG: With all due respect, it is such a poisonous issue, and it was raised twice, that I align myself on this score with the government if the motion for a mistrial is denied, as it was, to advise the jury it has been stipulated between counsel that when this agent used the word surveillance he meant it was Anthony Verzino under surveillance at that time, not Frank Pallatta.

I think that is what Mr. Amorosa owes us, in fairness.

MR. J. PANZER: I must object to what Mr. Goldberg gives as his alternative solution and most specificall

and strenuously objects to what Mr. Goldberg wants to align himself with the government's instruction that the government will ask your Honor.

THE COURT: I heard what he said. Why do you object?

MR. J. PANZER: I'm sorry, I just wanted to repeat it in my zealousness to make myself clear.

However, I say as far as the defendant DeLutro it is an incurable piece of evidence or whatever came in today it spills over as to my defendant and I press my motion for a mistrial at all costs.

MR. GOLDBERG: So I don't have to be concerned about a steel helmet, I didn't align myself with the government I want the record to show, I only accepted your Honor's ruling and once you denied my motion for a mistril, no matter how I scream and carry on, I must abide by the ruling and then seek the next best alternative.

I don't mean to align myself with the government.

MR. J. PANZER: There is no alternative.

MR. EPSTEIN: Before everybody jumps to their own alternative, might I inquire what other testimony Mr. Amorosa intends to elicit from this particular witness?

MR. AMOROSA: None, your Honor. None other than this testimony and his background testimony.

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THE COURT: What do you suggest, Mr. Hoffman?

MR. AMOROSA: I have to check my notes. I believe the witness has testified already he has seen these people on many occasions, and that Pallatta was also known as Bclot.

THE COURT: Yes. You have got that.

MR. HOFFMAN: In view of your Honor's ruling on the motion, I would ask the following, which is a little different than what was requested by Mr. Goldberg:

The Court has ruled just a few moments ago when Mr. Amorosa said the only basis, the only reason for the testimony of this man is to corroborate Verzino, and your Honor said to him, "Is that the only reason?" and he said, "Yes." Your Honor said, "That's out."

Since that's the only basis for his testimony, and your Honor said that's out, I would ask your Honor to strike all the testimony of this witness and tell the jury it is to be disregarded, and if Mr. Goldberg feels it is necessary to add a codicil to that and add any statements concerning surveillance, since Mr. Goldberg feels it is as bad as it was, and I agree with him, that the word surveillance had nothing to do with any defendant in this case, and that ends it.

THE COURT: The motion to strike is denied. All I want is your best suggestion as to what we do about the

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word surveillance already used by the witness on two occasions. I do think that my original suggestion is better but I am willing to give way; if you want to agree upon it, I will take what you agree upon, but it seems to me that the best statement to the jury, since it was said, and they heard it said, is to say that "We have dealt with this matter. The whole subject dealing with that phase about a meeting just begun to be developed is withdrawn, it is not being presented, it is as though it never took place," and I think that's the best, because if they heard it already, and the only thing that is going to make them reject it is the Judge's ruling that you must reject it because it's been withdrawn, that's it.

MR. GOLDBERG: If you feel that's the best in our interests, if we want to accept less than the best, do you object if we got together -- my promise along with Mr. Hoffman.

Now, having denied the motion for a mistrial and having denied Mr. Hoffman's motion to strike, I then ask for the codicil, as he referred to, namely, telling them that the issue of surveillance, whether or not it was raised, it's been agreed between counsel that the only one under surveillance it was meant to apply to was Anthony Verzino and none of the defendants, including Pallatta, on trial.

The government has said it was an accurate

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statement.

MR. AMOROSA: At that point in time.

MR. GOLDBERG: That's all we are talking about.

THE COURT: You can't lay down any conditions. You are here to help remedy something you brought about, Mr. Amorosa. And you weren't talking about any other point of time. You were developing this particular date and you were talking about a surveillance and you were talking about a meeting place. For all the reasons assigned by counsel we are on the tipping edge, and I do want to avoid it from going over, because I must say, on the record, something I didn't say before.

I feel duty-bound to say very candidly to the government that if even through inadvertence -- and I am quite sure it will only be through inadvertence -- Mr. Amorosa says something that I regard as prejudicial to the defendants or any one of them, I shall on my own motion declare a mistrial. This is only to reinforce the Court's impression, which the government must take cognizance of, that the Court is trying desperately to avoid prejudice from creeping in. I say again that it is about to tip over, and I don't want it to tip over. It won't take much to tip it over. And if that small amount is introduced I will feel constrained to declare a mistrial on my own motion.

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With that understanding, I will afford counsel an opportunity to confer with one another. I hope you will do it with all due speed and come back and let me know and have the benefit of your wisdom.

MR. CHANCE: Judge, this does not relate to any other defendant here in particular, but bothers me to no end, the introduction of the drugs as relates to William Chapman. Based on what Mr. Amorosa knows, and based on his opening statement to the jury, you reserved decision on the admission of the evidence as against William Chapman. I truly believe it shouldn't be allowed in for legal and moral reasons. He know basically Mr. Chapman was not involved in the situation, and it makes him more subject to a long prison sentence when he knows from the evidence he's gotten and the testimony of Perna and Verzino that Chapman is not even minimal here, and he presents the introduction against him.

THE COURT: You're saying, aside from the law and the evidence relating to Chapman, you want the government to urge the Court to drop it. I don't know.

MR. CHANCE: I am not urging them to drop it, but I am urging that based on his opening statement the narcotics should not be introduced as relates to Chapman.

THE COURT: I get it. All right. I will take that up with the government in a general discussion, which

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you said you would like me to do, and I will.

MR. CHANCE: All right, I'm satisfied.

THE COURT: Thank you.

MR. CHANCE: And it may be done in my absence.

MR. AMOROSA: We have other witnesses today who we called in obviously prior to your Honor's ruling with respect to this who would testify to similar occurrences.

THE COURT: When you say "similar occurrences,"--

MR. AMOROSA: Other surveillances antedating the indictment, the time of the indictment. It's about 4:15 now, Judge. We are going to ask that your Honor adjourn for the day.

THE COURT: No. I am going to sit until 5 o'clock, at least. This jury must not be kept.

MR. AMOROSA: I understand that, but I am not certain we will have enough witnesses to go until 5.

THE COURT: That's another matter. If you say outside that's all you have, why, that's fine.

mR. AMOROSA: Judge, we will have a witness today, I think he will be going on today, who conducted surveillance within the period of the indictment here.

THE COURT: That's another matter.

MR. AMOROSA: Is your Honor's instructions with respect to that witness he will not be permitted to say he was

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working surveillance at the time?

THE COURT: Within the indictment?

MR. AMOROSA: Within the period of the indictment.

MR. GOLDBERG: A witness may say what it is he did, what he saw, and what he heard. But to say "I was on surveillance duty" is the kind of thing we don't need in the case.

THE COURT: I won't do that. I won't allow him just to say he was on surveillance. You don't want me to take a question "Were you on survillance?"?

MR. AMOROSA: No, I would ask him "What were your duties that evening?"

THE COURT: What would he say?

MR. AMOROSA: "I was working surveillance, and I saw such and such a thing."

THE COURT: Must you keep on saying "surveillance". What did you say? "Were you on duty?" is a better word than surveillance. "Were you on official duty?" "Yes." "Where were you, what did you see?" That's it. Okay?

pm (In open court. Jury not present.)

THE COURT: Take your seats. It is now 4:35, and I wonder what counsel have resolved.

Mr. Goldberg, have you reached a decision?

MR. GOLDBERG: Could Mr. Hoffman make the presentation?

THE COURT: Certainly. Anybody.

MR. HOFFMAN: If it please your Honor, all counsel were outside and I must say, speaking most vociferously with one another,and with all good intents to try to find a way to instruct the jury on what we consider extremely prejudicial matter that came before them, particularly the area of the word of surveillance.

The only thing we have been able to agree upon is the fact that your Honor asked Mr. Amorosa whether any of the testimony of this witness was for the purpose of stating other than corroboration of the witness Verzino, and I guess Perna, and when Mr. Amorosa said yes that is the only basis for this man's testimony and your Honor as I recall according to your ruling you wouldn't allow any additional information to go any further concerning corroboration of prior acts, and since --

THE COURT: Prior criminal acts.

MR. HOFFMAN: And since Mr. Amorosa said that is the

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only basis for this witness the only thing counsel can agree upon in unison is therefore logically and within your Honor's ruling those statements should be stricken, because there is no other basis for it.

THE COURT: I hate to interrupt you, but I am adamant about this. There is a difference between evidence dealing with prior criminal acts and evidence daling with the companionship of these defendants. Where you have the government's position that these people were not strangers to one another, that they knew one another over a long period of time, that in and of itself doesn't show an unholy alliance, but it does show that they were familiar with one another, theywere people who grew up together. That is absolutely devoid of any evidence of incorruptability, or anything that is against the law, but it is testimony dealing with the knowledge of the existence of one human being with another. That is all that was received for and that is all it meant.

But when the government used the word surveillance with reg ard to a meeting place and concededly it related to an act antedating that which is in the indictment I said no, we don't go that far.

Now, you might as well forget it. I will not strike the testimony dealing with what this man had to say

up to the point where the word surveillance was used.

Now, that is it.

MR. HOFFMAN: May I then modify the request, if counsel would agree, to the following, at least on behalf of my client, and hopefully on behalf of all clients.

The witness' first few questions and answers were that he knew these people way back when and he saw them together. I ask that the court reporter direct your Honor's attention to those few questions and answers and that everything thereafter be stricken from the record.

THE COURT: That motion is denied. I am ready to listen to any suggest with regard to what I regard unwarranted use of the word surveillance on two occasions by the government, because of the Court's ruling, where he was interrupted and we asked the jury to excuse us and we went into the robing room.

MS. OBERMAN: To set the record straight for the defendant DeLutro we stand on the position Mr. Panzer expressed in the robing room. We don't think an instruction, even the striking of the testimony, is a sufficient remedial point.

THE COURT: Therefore --

MS. OBERMAN: We disassociate ourselves from this attempt to cure what we think is an incurable error.

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MR. GOLDBERG: Your Honor, I hope that when I stand and tell you what I suggest ought to be done, assuming that I must abide by your Honor's ruling there is to be no mistrial you know as anyone else would I don't mean to suggest there was no merit to my motion for a mistrial but I merely abide by your Honor's ruling and seek an alternate method, having to swallow the denial of a motion for mistrial, but I certainly don't abandon my position there was no merit to my motion.

THE COURT: There is no question about that. What you are doing is going forward having been denied what you sought to accomplish. You asked for a mistrial and the Judge said no. Then you said to yourself does that mean I remain salient? No, I try to pick up the pieces. Isn't that what you are doing?

MR. GOLDBERG: Of course. Without abandoning my position there ought to be a mistrial.

THE COURT: Precisely.

MR. GOLDBERG: There seems to be some confusion about the exact questions and answers towards the tail end of this agent's testimony which prompted everybody to rise.

THE COURT: Mr. Deutsch, would you be good enough to go back to the instant witness' testimony when the government began to inquire about and use the word

surveillance and with regard to a meeting place.

It didn't last very long, and as I recall it it was toward the very end of the testimony of this witness before we took a recess to discuss what had happened or the effect of what he had said.

(Recess.)

THE COURT: Those notes are not here at the moment but Mr. Deutsch says he can get them up here right away, so we will wait.

(Record read.)

THE COURT: I say that was not needed and we shouldn't have gone into it, but let us not multiply it, let us not make it bigger than it is.

I therefore suggest what I have said again, that I tell the jury that the government has withdrawn the last phase of its inquiry of the instant witness dealing with another episode, if you remember, ladies and gentlemen of the jury, that dealt with a meeting place with Verzino, that this witness is supposed to know something about. The government has withdrawn it, and I instruct you that no greater damage can be done than when something is withdrawn for you to attach any value whatever to it. You promised me that you understood all of that. We are not automatons, sometimes we blurt out something, we are human beings, and

we are likely to make an error here and there, this has been withdrawn and that is the end of it. You are to erase it from your minds.

Unless you have something better than that, that is exactly what I am going to say to the jury.

Hearing nothing, I ask the clerk to bring in the jury.

MR. AMOROSA: Judge, there is one thing. We don't ourselves have transcripts of the Verzino conversation with Cunningham and the Verzino conversation with Verzina.

THE COURT: I have got my mind on something entirely different. I just want the jurh to come in to clear up this one point and I am trying to figure out how I am going to say it and you get up there and bring something else in. I am not that good. You will have to take it a piece at a time.

MR. GOLDBERG: The two things I take it that will be stricken, so in case the jury asks to hear the testimony, would be that he observed Pallatta and Verzino together and that he did that observation while on surveillance duty.

THE COURT: I thought I wouldn't even repeat it for fear I would be doing damage again along the lines that you are objecting to.

MR. GOLDBERG: Correct. We have taken the position, the defense has, with the denial of the mistrial, that we want the testimony just stricken as you have indicated.

THE COURT: It is stricken and I will say what I have just indicated to the jury, that I have stricken it.

Very well.

(In open court; jury present.)

THE COURT: Off the record.

(Discussion off the record.)

You have been patient, and the Judge is always in a state of worriment that you should understand why this comes about. The attorneys are, to use the vernacular, on the ball. They delight a Judge because they are on their toes, and I am talking about the lawyers for both sides, and they right, as they should, and it takes time for them to develop their arguments, and so time rolls on, and with an impatient Judge -- and I can perceive that that is one of my limitations -- time is not wasted, I make them come right to the point, and they have.

There are many loose ends that have to be tied together, and that requires resolution, and a Judge has to step in and do the best he can no matter who likes it and who doesn't like it.

That, too, takes a lot of time. But all of it

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reduces the total amount that must be spent if there wasn't an exhaustive analysis of the different points that counsel wish to advance. They have shown themselves in creditable fashion before you. I wish you could listen to their arguments as lawyers. Your esteem for them would multiply. One of the things I want to call to your attention, and the only thing really, it is ten of five and I want to let you go as there are other legal items they want to take up with me with which you have no concern but which I have to resolve, but one of the items I want to take up with you is that toward the close of the witness who was on the stand before the recess there was something brought in about the witness having seen Verzino at a certain meeting place. You will remember. It only lasted half a minute. Counsel objected to it.

Well, we thrashed that all out. That was one of the items that we thrashed out in the robing room, and the government has decided to withdraw what it proposed to develop with respect to that meeting place and the knowledge, if any, of the witness with regard to that meeting place.

When that happens, as it has happened, and I have strikcen that testimony, and it only was about half a dozen questions, and answers, I have stricken it, it is as though it was never uttered, and the government withdraws it.

When the Judge says that to you you are to consider it as though it didn't exist. I have erased it.

When the government says "I want to withdraw" I still have to approve. "Right," says the Judge, and it is as though it never came out.

You say "What's so important about it?"

That is just it. I don't want you to attach any importance to it. I want you to dispel any reaction to it. Do I make myself clear? Is it not the same thing I have had occasion to take up with you on prior occasions? After all, is every word I say the last word? No. If I talk spontaneously, am I going to be as perfect as I would be if I wrote it all out? So that I will make errors once in a while, and I will say something once in a while that is likely to convey an impression that I don't want to convey at all. Once in a while the lawyers will do the same. They are human beings just like I am and they make an error here and there.

If every single time they do something which on second thought they find they shouldn't have done are they going to be penalized every time? The law says "No. Tell the jury to eradicate it from their minds. And you, Judge, must have faith in your jury that they will eradicate it, and if they can't eradicate it they should hold

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up their hands and say, Judge, I can't eradicate it, it sticks in my head and I can't get it out. In which event I will deal with it."

Now, do these few questions and answers in any way upset you that it sticks in your mind that you can't get it out. It was a small episode. I don't know what importance you attach to it. So I ask the question, is there anyone here that was so affected by that small bit of testimony that you can't get it out of your heads?

How many of you really remember what I have just referred to? Raise your hands.

(Showing of hands.)

THE COURT: There are three or four hands. It was on its way to being developed, and that explains why only three or four can really remember what was said.

Well, I am glad of that. That makes my task easier.

Good night, ladies and gentlemen. See you tomorrow morning in this same place at 10 o'clock on the button. Now, when I say that I want this to be understood. I said on prior occasions I will not have the Judge and the jury -- jury and the Judge is a better way to put it -- wait for anybody. If a defendant fails to appear I shall forfeit his bail and remand him so that he will be here when

(8:30 p.m.)

(In Judge Cooper's chambers.)

(All counsel noted except Mr. Lang.)

THE COURT: For a few minutes off the record.

(Discussion off the record.)

THE COURT: Let's go on the record.

It is now 8:35 and we have met in chambers so that I can get the benefit of your respective arguments with respect to some of the points that have to be resolved and which effect the introduction of evidence on the morrow.

The first point we want to take up is the government's position with respect to the cash that they wish to prove was in the possession of the defendant Lucas.

Now, will you please open up and tell me exactly what the evidence amounts to on that score?

MR. AMOROSA: Yes, sir.

We intend to prove that in January of 1975, this year, Judge, January of 1975, we conducted a search of Lucas' home at 933 Sheffield Road in Teaneck, New Jersey, pursuant to a search warrant, and we discovered in the home at various places cash aggregating some approximately $584,000.

Approximately $200,000 of this cash was found outside the bathroom window, indicating an attempt to conceal

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that money and to prevent its seizure by representatives of the government.

The possession of this cash was charged as an overt act in the superseding indictment. We rely on U.S. against Tramunti, 531 F. 2nd 1087 for the proposition that this evidence should be admissible against Lucas and the other defendants on trial in furtherance of the conspiracy.

In Tramunti the Court held at page 1105 that almost $1,000,000 in cash was admissible against the defendants in that case as the possession of large amounts of unexplained cash in connection with evidence of narcotics trafficking on a large scale is similar to the possession of special means, such as tools or apparatus, which is admissible to show the doing of an act requiring those means, the Court citing Wigmor, Third Edition, 1940, at 561, and also citing U.S. against Bynum, 350 F. Supp. 400 at 491, District Court opinion, Southern District of New York affirmed 485 F. 2nd 490, 1973.

The Court also held in Tramunti that evidence of sudden acquisition of large amounts of money is also admissible to prove criminal misconduct when pecuniary gain as here is the basic motive. Citing U.S. against Jacobson, 102 F. 2nd 683, 684 2nd Circuit. Jacobson itself held that this evidence, the sudden acquisition of large amounts of

cash, would come in and was relevant even though the source of the money is not traced.

With respect to this case, your Honor, it is clear at this time from the record that Mr. Lucas was dealing in tremendous amounts of cash, and had possession of tremendous amounts of cash which he, part at least of which he gave to Perna and Verzino during the course of this conspiracy which ran from April 1973 to the time these people were arrested, Verzino being the last arrested on February 25, 1974.

Also, when Verzino was arrested on February 25, 1974, Lucas owed the Verzino- Perna-Malizia partnership, in excess of $300,000 in connection with the narcotics transactions.

It is our position that in light of this testimony establishing Lucas prima facie as a major narcotics trafficker and if you recall, Perna testified that Lucas said during the course of this conspiracy he had several lieutenants, and he had the check his lieutenants, that he had competition with Nicky Barnes, Nicky Barnes was getting a better package on the street, indicating Lucas was on top of his own organization and filtering the heroin down to the street level, and indicating again that he had access to tremendous amounts of cash in connection with this business.

We think the evidence of his possession of this cash, the attempt to conceal the cash by throwing it out the bathroom window -- we found it outside the bathroom window or a large portion of it we found outside the bathroom window -- goes to evidence of his guilt in connection with the conspiracy charge here as well as of course the guilt of everyone else charged in the conspiracy count.

In Tramunti the evidence came in of not quite $1,000,000. In that case the Court cited to this fact in supporting that. Approximately eight months before the seizure of the -- let's call it $1,000,000, I think it was a little less than $1,000,000 -- the person who was seized with the money was given 8,000 to 10,000 dollars of that money, and they cited that in support of the proposition that it was then relevant to bring in the million dollars against that person as well the other members of the conspiracy. 8,000 to 10,000 dollars.

Here Perna and Verzino have testified to hundreds of thousands of dollars coming in by Mr. Lucas over a period of months, over the period of this conspiracy, and we simply think that on its face this evidence shows and corroborates the testimony of Perna and Verzino that Lucas was their major customer or one of their major customers in this narcotics operation.

That is our position, in substance, Judge.

THE COURT: Mr. Hoffman.

MR. HOFFMAN: Yes, your Honor.

If it please your Honor, I don't quarrel with the government's statement of the law and the cases as they have been handed down by the Court of Appeals. I think again this is an area that goes to the discretion of the court. I think the tenor of the appeals decision in both Tramunti and Bynum were basically justifications of the Court's admission into evidence of these monies.

In other words, they justified the admission and said, "We will not reverse," as was laid out to your Honor.

My position before the Court is more on a practical basis. I frankly think if the Court lets in the money I don't think that that is reversible error and I think probably the Court of Appeals would come down in a similar basis as to others, and to argue differently I think would be arguing somewhat less than openly to your Honor.

However, I think there can be no question in your Honor's mind that each case is different on the facts. In this case you basically have a case built upon two informants whose charac ter and background and believability is certainly dubious, I would say, to say the least.

The government may press its other evidence even

more strongly because of that and say "We need these other things to gain a conviction because of the nature of our witnesses."

Admittedly, that is a problem on their part, but I don't think that is what should influence the Judge. I think when you have a marginal case in terms of believability and credibility of the evidence -- certainly a huge volume but in terms of its credibility -- to admit something overwhelmingly prejudicial in and of and by itself, really should give pause to consideration in that kind of a case.

In almost any case if you put before a lay jury the fact that even a man of means in a legitimate enterprise, a man who the Court could take judicial notice has large sums of money and whose family and reputation is well known for it -- I don't want to mention obvious names in a case of this nature -- but if a man like that were to have been found with cash as opposed to bank accounts or other kinds of wealth, in denominations of tens and twenties and fifties, the suspicion that that alone would bring upon such a person, upon any person, the most credible of people, is tremendous in a jury's eyes, and it does is it brings forth to that jury the thought "This man must be doing something wrong because people don't ordinarily have large sums of money."

And although the government doesn't argue on

that basis, that that's the reason for putting the money in, I think when I was a prosecutor, and I don't think prosecutors have changed that much in the small amount of years I have been out, that though it definitely goes through your mind and it is one of the things that you know inures to your benefit.

If in this case the specific money had been connected with the conspiracy, a witness testified that he was supposed to meet Mr. Lucas the next night and Mr. Lucas was going to give him "X" dollars, or even the next week or month, and it takes a period of time to gather this together, that would be a source of actual connection to that specific money in terms of evidence.

Here not only is the record bereft of any such evidence, but I took a chance in examining the witnesses who said Lucas owed them a large sum of money to see if there was really any expectation by the time Lucas was arrested, January of 1975, that they would get this money. In fact, what came out is they were arrested, they were in jail, and they really felt that they were going to be beaten out of this money. So much so that they went to another lawyer and asked him if he could help them collect, because they figured "We're in jail," and they pretty well knew that this was it, they weren't going to get any more money, they weren't outside where they go to

Mr. Lucas and say, "Give us the money," or any manner they would ordinarly speak to one of their clientele.

There is really no connection to this money of any real degree in this case, and barring that, with that lack of connection, the prejudice not only to Mr. Lucas, but to everyone in the case -- but my argument basically has to be to Mr. Lucas -- is so overwhelming and so great that what the jury would have to say to themselves is "Well, maybe we have some doubts as to credibility of the witnesses, and if so," and if they are reasonable we may feel the government didn't prove its case, but when you put in something this prejudicial --

THE COURT: I get your point.

MR. HOFFMAN: Two other quick matters I would like to bring to your attention.

One is that there is no indication that this money comes under the sudden wealth doctrine, as in other cases. The record is bereft of any evidence this money comes from sudden wealth. It may come from five, six, eight years.

Secondly, I tell the Court, I represent to the Court, that in terms of the attempt to conceal, that attempt not only factually had nothing to do with Mr. Lucas, but in fact Mr. Lucas' wife, in the Federal District of New Jersey, had been charged as the person who took the money and threw

it out the window. Mr. Lucas was in custody and as a matter of fact, I think either gone or going, and this was money that was under her control, so it is alleged at that time, and it was alleged factually she threw it out the window and in fact she pleaded guilty to that charge.

I think those two aspects that the government talks about in fact are not a matter to be considered in this case.

THE COURT: Are you through, Mr. Hoffman?

MR. HOFFMAN: Yes, your Honor.

MR. EPSTEIN: If I may briefly, the government earlier alluded to United States of America vs. [illegible]amunti. In that case when the suitcase containing $930,000 was recovered it was recovered right in the middle of the conspiracy period. It was recovered in the possession of one Vincent Pappa and Joseph DeNapoli and after much deliberation like your Honor is taking here Judge Duffy finally admitted it over objection.

At the conclusion of the case, Judge Duffy quite frankly was somewhat surprised, not to say astonished to learn the government intended to use that same sum of money in another case. They did use it in United States of America vs. Pappa, et al.

I have spoken to Mrs. Rosner and Mr. Fisher, appellants' counsel in that case, and although the briefs

were completed many months ago and the case has already been argued, there has still been no decision forthcoming from our own Court of Appeals.

What happens in these cases is the government seizes a substantial sum of money. Mr. Lucas has two other indictments. I daresay as we sit here, your Honor will see the money will resurface time and time again as long as there are charges anywhere either naming Lucas as a defendant or naming Lucas as a co-conspirator, and in each case the government will use the money for the similar purpose.

It has an inflamatory tendency with the jury. I don't think we can deny that. I think your Honor will find this as well.

Where is the link between Lucas and that money? I am not talking about the link between Lucas and the money. But the link between Lucas and the money in this conspiracy.

Lucas, as I understand the testimony, came into the case through an arrangement that Mario Perna had made through another man by the name of Harrison, met Lucas, and then Mario Perna and Ernest Malizia began to supply Frank Lucas with heroin in quantity.

However, that entire arrangement ceased to exist as of the 25th day of February, 1974. That's almost a full year before this money was recovered. Lucas was arrested in

this case at the end of January, 1975, as I recall it.

It clearly cannot be that Lucas was merely sitting on this substantial amount of money waiting for Perna, Malizia or Verzino to come out of jail. I think it quite likely he had no reason to believe they ever would come out of jail in view of their past criminal records.

Lucas, as the government would attempt to prove, used this money in other narcotic conspiracies with other conspirators with whom in fact he was involved.

You get a question here where the government gets a large sum of money and keeps introducing it and re-introducing it in case after case.

When Lucas was taken into custody at the end of January, 1975, he had been named as a co=conspirator in U.S. against Corraluzzo. This is the evidence I referred to earlier against one involving Rossi, when Lucas was arrested it made Page 3 of the Post, that he had been arrested in possession of this sum of money.

Judge Carter was quite upset, but the government indicated they had no way to know about the Post article breaking. I think Judge Carter's being upset by the matter and the fact he had to discharge all the alternates in a multi-defendant case after four or five weeks of trial, indicates the prejudicial value he believed the money would have in that

setting, even though Lucas was a co-conspirator.

In this case there is no defendant here who can testify what was going on with Frank Lucas in January of 1975. The conspiracy as such doesn't exist really beyond February of 1974 because the other members of the conspiracy, Perna, Malizia and Verzino, were in custody at that particular period. Their narcotic days we would hope would have ended with their incarceration. Lucas may go on. I will assume arguendo he was going on with others in another venture.

This money can't be handled in this indiscriminate manner, having it introduced and re-introduced.

In this case everybody has the same desire. Nobody wants to try it twice. If the Pappa case rules it was improper or inadmissible for the money to have been re-introduced in the Pappa case after having been introduced once in the Tramunti case, what is going to happen to our case here? It may not come down until such time as the money has been introduced someplace else as well and we will be sitting there and saying, "Well, gee."

In a case like this the government drafts the indictment. It is the government's indictment presented to the grand jury. They either vote it up or down. If the government wanted to try Lucas with all this money they could have tried him alone. The trial would have been concluded

inside a week. But the government has tried this case with everybody together. In trying the case they not only can consider on the one hand relevant evidence, they also have to consider the prejudicial effect such evidence would have upon the other defendants. To say it is prejudicial as to the other defendants, I think, minimizes the argument, quite frankly.

For the reasons I have stated, I respectfully suggest your Honor keep this money out of evidence and not allow it before the jury in this case.

MR. J. PANZER: Your Honor, I have one point I would like to impress on this Court.

The salient feature -- I adopt Mr. Epstein's argument in toto, but we have the narcotics, and very, very true the conspiracy ended February 25th, when Verzino was arrested. This money had -- I'm talking for DeLutro. This money may be a different conspiracy all together. For that reason I would strenuously object for DeLutro to the introduction of this money.

MR. GOLDBERG: Your Honor, may I say this:

The government, I think, has two other indictments pending against Lucas.

MR. HOFFMAN: That's correct.

MR. GOLDBERG: Would it be sharp practice --

perhaps that is too strong a word addressed to the government--but wouldn't it be unfair if this $500,000 was a piece of property that the government intended to use in these other Lucas cases with respect to other sets of defendants; placing before your Honor this $500,000 as Government's Exhibit 87 in this case, and against these defendants, and then we see it Government's Exhibit 23 against six other defendnats in another case, and we see the same $500,000 against another set of defendants in a third case?

If the government has intentions of using this, or has used this $500,000 in connection with any other grand jury presentation with respect to any other case, I think the government ought to advise the Court of that whether in open court or in camera, but it seems to me if the government has made use of this $500,000 in any other presentation before any other grand jury, then the government is just not being fair with the Court or counsel in using and spraying this $500,000 as it wishes, from one case to another, recognizing that another judge is another day and he will make the same arguments he has made here and they will get it in against five other people in another case and four other defendants in Lucas' third case.

It seems to me there is something unfair about it. The government has to commit itself to a position, and it

can't be in effect, not forum shopping, but spraying the same evidence around without taking a positive position as to which case this $500,000 ought to be admitted.

It seems to me unlike Tramunti whereas Mr. Epstein points out the money was seized in the middle of the conspiracy here this is money seized a year after, and Lucas' conduct in the year from the time of the arrest of Perna, Malizia and Verzino may well -- and I don't know the answer to this -- be the subject of this additional one or two indictments against Lucas so that this $500,000 belongs in that indictment.

I think without getting the government to commit itself to a position would be unfair to these defendants. It ought not to be sprayed around in all of these Lucas cases.

MR. BLOSSNER: If your Honor please, my argument very briefly is one of fundamental fairness.

Congress has seen fit in its wisdom to allow Anthony Soldano to be tried at the same time with Anthony Verzino and Frank Lucas. If the government's case should go, they are people at opposite ends of a triangle.

The government has said acts of Mr. Lucas can come in to show a conspiracy with Mr. Soldano at the other end.

We know Mr. Perna was arrested February 1st,

Mr. Verzino was arrested February 25, 1974. The only thing they have spread on the record is knowledge of Mr. Lucas' acts prior to those dates.

A year passed before agents arrested Mr. Lucas someplace in New Jersey with cash in his house, cash on hand in his house.

Can that cash fundamentally be traced to Mr. Soldano; be traced to the other defendants here? Is that the probative value, or is it only in there to inflame the jury against men like Mr. Soldano?

In the Tramunti case, your Honor, several of the defendants were arrested at the time that this large sum of money was seized from one of the defendants. Also, those defendants were under surveillance, they were seen coming from a house which had been occupied and used by several of the other defendants. That money was right in the middle of that conspiracy.

Here we are talking about money coming in which is found a year after both informants are in jail, is found in the form of cash, it is found in New Jersey, it is someone else's house, but it is used to inflame the jury against my client all the way on the other end of the triangle.

THE COURT: All right.

Before I turn to the government, does anyone

wish to speak in opposition to the government?

Very well.

What do you say in answer to the points that counsel have raised, Mr. Amorosa?

MR. AMOROSA: Judge, besides -- first of all, let me say besides the money that we seized at the time of the execution of the search warrant, we seized other items, also, which are relevant to Mr. Lucas' guilt in connection with the instant indictment.

There were several large bags, cellophane transparent bags, I believe, which were also seized and which we intend to introduce in evidence.

We seized a gun, we seized a heat-sealing machine which is used to close bags in the narcotics trade, and to seal bags in the narcotics trade.

We will be introducing those items. Besides the substantial sum of cash, we also seized some lactose, which is a cutting agent for narcotics.

Judge, the question here is not whether this evidence is going to be used in subsequent cases. The question before this Court is whether it is relevant to this case.

Under the authorities, Tramunti, etc., the evidence is relevant to this case. In Tramunti, although the

evidence was seized from just one or two people, it came in against all the defendants, just as we propose it to come in in this case.

I can only repeat what I said before. Under Tramunti the evidence linking this money to DeNapoli was that eight months prior to the seizure approximately eight months prior to the seizure, he received 8,000 or 10,000 dollars of narcotics money from another defendant.

Here we have Lucas generating tremendous amounts of cash. The seizure of this money logically and inferentially establishes that Perna and Verzino was telling the truth when they testified with respect to Lucas that he was taking substantial quantities of heroin, he was paying substantial monies, and the conspiracy in this case, Judge, did not end according to the grand jury with Verzino's arrest. It ended at the date of the indictment being filed.

As indicated, this possession of this substantial sum of money was charged as an overt act in this particular indictment. In terms of relevance it is charged by the grand jury as an act in furtherance of the conspiracy.

The government will also prove Mr. DeLutro engaged in additional narcotic transactions during this perio of time, not only Mr. Lucas. Counsel's argument with respect to some future cases in which this evidence may or may not be

introduced is totally irrelevant. I have no knowledge, no personal knowledge, that this evidence is intended to be introduced in the future. It may well be, but that has no relevance to your Honor's decision. That's all we say with respect to it.

We think under the authorities, as Mr. Hoffman himself has admitted, this evidence comes in.

MR. GOLDBERG: I don't want to extend it, but recall that I had said perhaps the government ought to advise the Court in camera, and on reflection, I think perhaps the Court would be advised to advise counsel under the concept of Brady, exculpatory evidence, and that is if the government intends to or has any information or has presented to a grand jury evidence tending to link this $500,000 to another conspiracy in connection with other defendants, that is information which the defense in this case ought to know becuase it contravenes the government's theory in this case that this money is chargable against these defendants if there has been a presentation made before any grand jury to the knowledge of the prosecutor.

When he says his personal knowledge, I don't know whether that suggests there may be somebody else in the office handling another Lucas investigation, and Mr. Amorosa modifies it to say personal knowledge, he doesn't know

whether it is being presented in other cases, but if this money has been presented to a grand jury as part of a conspiracy involving "A, B, C and X, Y and Z", then not only is that an added reason the money shouldn't come in in this investigation, but the government I would say ought to be required under the concept of Brady to advise us of such information which contravenes or contradicts the theory pressing here before your Honor.

The government cannot have it three ways, that this money -- well, I don't want to repeat it.

THE COURT: I would be false if I didn't say that a point that has not been answered by the government troubles me, and that's the point that counsel have raised with regard to this fund.

If I am to understand that the government wishes or desires or is inclined to use this same piece of evidence with regard to other conspiracies, then it seems to me that it shakes the contention of the government that this money related to the conspiracy with which we are concerned.

I notice that Mr. Amorosa did not meet that point, but goes back to Tramunti. Tramunti did not have this point. There was no such argument. We read Tramunti because we had to decide the motion brought on by Mr. Hoffman prior to trial in which he sought to avoid the introduction

of this very same evidence, and while we denied the motion it was predicated on other bases.

Now, I am not going rule unless I resolve that issue, and it has got to be resolved. This Judge is alerted to it now. I don't know anything about the Pappa case, we ought to take a look at that, but don't tell me that a judge should allow this evidence in unless the government is going to assure the Court and the jury that this money belongs to this conspiracy.

MR. AMOROSA: Judge, I'm not aware of the second pending Lucas indictment. I am aware of one pending Lucas narcotics indictment in which Mr. Lucas was not charged as in the conspiracy count in that indictment. I am at a loss to answer your Honor with respect to this since I haven't spoken to the Assistant in connection with the money. He may have intentions of putting the money in in connection with that case.

But, Judge, our position is not necessarily that all of this money relates to this conspiracy. Not necessarily that at all. Our position is at least some of it relates to this conspiracy.

Lucas only owed Perna, Verzino and Malizia $310,000 under the proof at the time of their arrest, so as to the difference between what he had and $310,000, that money

probably had nothing to do with what he at least owed them, but he continued his activities, is our position. It doesn't matter whether he continued his activities with Perna, Malizia and Verzino to permit the government to introduce all of this cash. All it matters, our position is, is that he continued his activities and he continued his conspiratorial activities in connection with this case, and he went out and he sold additional heroin, and he got additional heroin and sold it and generated more cash. That is all in furtherance of the same conspiracy. That is charged in the indictment.

We admit that after the summer of 19 -- I think the proof ended in the summer. They didn't stop in their attempts to get the money back. Immediately after their arrest there was some testimony they talked to an attorney, they tried to work out a deal by which they would get back their money and that ran into the summer, so we are not talking about an entire year, and we are not also talking about the fact that these people called it a day, in the vernacular, and tried to get the money back.

They wanted to get the money back and tried to get it back. The jury should be entitled to find perhaps Mr. Lucas was holding the money to give to these people on another day.

As to the possibility this proof may be

introduced in another case, I can't answer that issue at this point because I am just not sure what the Assistant intends to do and what his position in the case is, but I can say this:

The money introduced in Tramunti, in the Tramunti case, was also introduced in the Pappa case in the trial. The same money was introduced. In that case the District Court let it in over the same objections now being made in connection with it. As Mr. Epstein says , that matter has not been decided upon on an appeal yet.

It is our position it should be permitted to come in and the jury should be able to find, based on this proof, Mr. Lucas was continuing in the narcotics transactions and retained some of the money he owed to the Perna-Verzino-Malizia partnership, as well as making more money on his own in narcotics transactions.

MR. J. PANZER: I would like to answer that.

The argument is pure sophistry. He wants to take this $587,000 and split it up into parts, and have the jury believe --

THE COURT: I'm sorry, but each one is entitled to your rapt attention, because if you are going to help me you have to cover everything and follow everything like I do.

MR. J. PANZER: He wants to split it up into

parts, $287,000 in this conspiracy, another $50,000 in another conspiracy, 100,000 in another conspiracy. That can't be done, Judge. It is either one or the other.

You have got to fish or cut bait. That's as far as DeLutro is concerned.

THE COURT: Mr. Panzer, the government has given something of an answer. Whether it is complete remains to be seen. The government says "Do we have to prove anything more than that there was a certain amount of cash not found in the regular course of a human being's enterprise, but which fits right in with the contention of the government that there was a conspiracy looking to the sale of narcotics for cash, and that Lucas was a prime move in that connection, and in the light of all the testimony of the witnesses with respect to their dealings with him, the government is saying evidence of cash dealing with these narcotics is found in the amount that was discovered in his place. How much of that came from this conspiracy," says the government, "we are not prepared to itemize, but some part of it, a substantial part of it, came from this conspiracy."

In other words, the government is saying, "Do we have to prove that $500,000 came from this particular conspiracy? Isn't it enough if we show an inordinate amount of cash on hand by a prime move in the conspiracy which could

very well include cash from the conspiracy involved with which we are involved in this indictment, with which we are concerned?"

That narrows it somewhat. It doesn't completely satisfy me, but it is a suggestion, and it is something to ask ourselves whether or not there should be, if we do receive this, a qualifying statement to the jury.

Let me tell you what I am satisfied with before we finish the point:

I am completely convinced that where the law says, "Judge, you have a discretionary matter,"that when counsel confronts the Judge with that as though it were an "open Sesame" that I could employ to district myself from any given position counsel is dead wrong. I may be guilty of an abuse of discretion, which goes both ways.

"Judge, you absued your discretion, we reverse you." That happens over and over and over again.

And so it isn't so easy as you put it: "Judge, you have got discretion." Well, I've got discretion, but am I not going to abuse that discretion, whether it is this instance or any other instance, just because it favors the government? Of course not, the government is a litigant as much as Lucas. I told the jury already, and I shall tell them again, that when the government comes into court in the United

States of America, it starts at home plate, and I am sacrificing a World Series game tonight, too, my dear counsel, all of which is small enough, but just in that sense they both start at the same spot, the same place.

The government is not on first based or second base.

I must ask myself what my obligation is to the government. It is no less an obligation than it is to any one of these individual defendants. Don't tell me that that amoutn of money hasn't an enormous whack when it finds itself in the record, if it should. No one knows that better than I, and that's what makes the business of being a judge fraught with peril, with uncertainty, with the constant search for answers.

It is not enough to say in one case there was a large sum of money and that makes it all right for this case. It amounts to the circumstances surrounding the money. My task would have been easier if there was some linkage. In some cases there is that linkage. There is nothing here but a large sum of money and the surrounding circumsntaces, so I want you to know that my worry is not on the dreadful impact of this, and I concede it. If it has to go it has to go. The question is, does it belong, would I be abusing my discretion if I failed to let it go in? In my book, it makes no

difference whether it goes in for the government or goes in for a defendant. Does it belong? What is the principle of law that should govern my act?

I'm sorry, but like the surgeon, we have got to operate. "I didn't know it was going to be this complicated," says the surgeon, "I thought it would be an hour. We are already on our third hour and we are still operating. Go take a look at this last clip and see whether there is cancer," and he's got to wait and see the microscopic examination that is returned to him.

A trial is not at all unlike that. A surgeon has to go ahead and do the best he can,never being too sure.

MR. J. PANZER: Query, Judge. Isn't this analgous, isn't this on all fours with the surveillance situation that we had today where your Honor said "You are overtrying your case, why do you want to put in surveillance?" Isn't that in the same vein?

THE COURT: I'm sorry, there I don't agree with you at all.

Mr. Amorosa, let me put the direct question to you.

MR. AMOROSA: Yes, sir.

THE COURT: What's wrong with telling the jury, if this does go in -- and you might as well know I am inclined

to let it in, I have never fooled around with my brothers at the bar, they are entitled to know the Judge's thinking, t and I have never lost out by it.

I think to a large extent Tramunti compels the introduction of this evidence. I recognize that it is fraught with a great deal of concern and worry, and I know the human reaction to this large amount of money. I am aware of it. And that gives more than temporary pause. I am not being introduced to this for the first time. The pre-trial motions alerted me. I knew the exact amount, I knew the circumstances all of which had to be disclosed for the purpose of the motion.

Since that motion we have had an enormous amount of proof, and that's what I am called upon to weigh and to try to deduce from that that this money has some connection with the evidence. The fact that it is mentioned in the indictment does not influence me one bit. Sure, they charge it as an overt act, but whatthey charge and what you prove, are two different things, as I told the jury. You can charge a man all the way down the line. You have got to prove it.

So the fact that the grand jury chose to say this is an overt act is just a recital. It has got to be fortified by tangible, overt, pulsating proof, and what you

have said does go to that issue, but not to the point where I can summarize it without saying, in all candor, that I am disturbed on that score, and want to give a little bit more thought to it.

You yourself say, "Judge, I haven't put in all the evidence."

You did everything you possibly could, I'm sure, up to now, but really, the evidence relating to this issue you yourself in tonight's recital reveal that there is other pieces of evidence that has a direct connection with this money, and that might resolve it. I don't know. But you yourself admit "I haven't got all the evidence I should have in order to determine whether this money goes in."

You mentioned something about drug paraphernalia there, did you not?

MR. AMOROSA: Yes, I did, which was also seized.

THE COURT: And didn't you say other pieces of evidence?

MR. AMOROSA: Yes, sir, and I think I delineated which I was referring to.

THE COURT: Yes, but I haven't heard it, have I? You haven't introduced it, have you?

MR. AMOROSA: No, sir, because it would come in

the same time the money would come in if your Honor ruled the money was admissible. That is, while we were executing the search warrant, we sezied these other items in addition to the money.

THE COURT: These other items, sir, offer very little resistance that I would recognize. The money falls in an entirely different category. That's where we jam, and I don't like it, to tell you frankly. You must know the difference between this other evidence and $500,000 in cold cash. We have had plenty of that kind of evidence, haven't you, of the other kind; envelopes and money and -- I mean heroin. Just today you introduced pretty near a half-million dollars worth.

So that envelopes is more of the same, but the point is, it was found there in Lucas' home where the money was found. Do you see the difference?

MR. AMOROSA: Yes, sir, I am aware of the difference between --

THE COURT: Why do you couple them together as though they belong together?

MR. AMOROSA: I didn't attempt to do that. I was saying we would get to that proof --

THE COURT: When I say you haven't proven that material yet, why don't you say, "That's right, Judge, we want

to put that in and we want to get it in as fast as it can, and it does belong in connection with your Honor's contemplation of this money."

But to put it on the same basis as the money, no, the money is a worrisome proposition. More envelopes and that paraphernalia are not. But the fact they were found at the same place with the money may bring you a little closer to the money, as I see it.

MR. AMOROSA: Judge, if I may, I was going to suggest if your Honor is having difficulty with admitting this money against all of these defendants, it is our position that if that is your Honor's position that the money come in against Lucas only, and we don't think there is any question at all based on that set of facts.

THE COURT: Make up your mind. What does the government want?

MR. AMOROSA: Our position is the money should come in against all defendants in furtherance of the conspiracy but if your Honor rules that the money should not come in against all defendants in furtherance of the conspiracy, it will be our position, our alternative position, that the money should come in against Lucas as probative of Lucas' guilt, as corroborating the testimony of Verzino and Perna with respect to Mr. Lucas.

THE COURT: Well, Mr. Hoffman, I wasn't having too much difficulty with Lucas. My worry on the money, to be frank with you and talk in the same spirit of openness, which I countenance and which I think cements us in this common resolve, I wouldn't have much difficulty with that.

My worry on the money really not only was with relation to Lucas, which was the easiest, but in relation to the co-defendants here. So I give you your chance to answer that. You heard what the government said just now.

MR. HOFFMAN: My response would be the following your Honor:

I am sure that there might be some argument by counsel as to what limiting instructions, what effect limiting instructions might or might not have on a jury as to their clients. That is up to them to discuss.

As to Mr. Lucas, I think that the exact arguments that were advanced originally as to all the defendants applies to Lucas in the following manner:

There is no question that Mr. Lucas has subsequent indictments for narcotics, one pending before your Honor scheduled to go on trial November 10th. Undoubtedly, in those indictments, the charge is that Mr. Lucas was involved --

THE COURT: May I interrupt you? I got the

point already and I want you to know if anybody before me uses that and doesn't identify it with a complete recital of what took place with regard to that same money in another case I shall make it clear and compel its revelation. Make no mistake about that.

MR. HOFFMAN: I appreciate that, your Honor, and I think your Honor is correct, but what I am trying to get at is Mr. Amorosa seems, throughout the trial, to have an idea which he clings to very strongly that people dealing in narcotics are in -- there is no such thing as ends of one conspiracy or beginning of another.

If Mr. Lucas is a narcotics dealer, he is a narcotics dealer.

THE COURT: For all time.

MR. HOFFMAN: For all time. Though that may be the fact in terms of what he does with his life, they follow through, Mr. Amorosa follows through that that also means that he is continuing in all the conspiracies together. If other people were arrested and never dealt with them but continued dealing with other people, he sees no break in it. He says this is all-time dealing and all the conspiracies run together. I don't think that is the law and I don't think that is the fact.

THE COURT: I want to understand you.

Do you mean to say a bigshot like Lucas cannot operate five different conspiracies at the same time?

MR. HOFFMAN: I would say certainly he can at the same time. More importantly, as to this case, at separate times. If he is finished dealing with some people and a year later is involved with other people, buying and selling and having cash, that has nothing to do with the prior conspiracy, and even though he may be a bad guy a year later and involved in dealing with narcotics which is the same subject matter as previous conspiracies if they know in good conscience not only --

THE COURT: Who is "they"?

MR. HOFFMAN: The government.

Not only in their knowledge, but so far as to have brought forth indictments that subsequently he was involved in narcotics conspiracies with other people, I know that they would like to say whatever evidence we find against him should be used in all the areas, but I just don't think that that is fair.

When you are seized with money a year after, eight months after, whatever the delineation is, but a substantial time after your real dealings in the conspiracy in this case are over, and, furthermore, you are indicted and known to be involved with other people in other conspiracies where this

money probably was involved, I just don't think he can stretch it back, and that's my argument.

THE COURT: Is there anything further anybody would like to say?

(Discussion off the record.)

MR. E. PANZER: I was about to say, your Honor, in this very case now we have three conspiracies. We have three sources that are not connected to each other on the government's theory of the case. One is the Pallatta group that they say drugs came into this case, the other is the Soldano group, and the other is Mr. West. This is the government's alleged proof.

I am not saying for one moment this is what they have proved to the satisfaction of the jury. So we have got three conspiracies running around in between this case.

Now Mr. Amorosa wants to inject other conspiracies that we are not even trying with respect to this money with other people that were involved.

Now, this Wiley case, up in the Second Circuit says that is all right if your Honor can explain it well enough to the jury in your Honor's charge. I quite frankly can't see how your Honor is going to do it, but my faith in your Honor leads me to the conclusion that you will, but if the government is now going to inject other conspiracies --

who knows how many more --

THE COURT: I am going to tell the jury if they find another conspiracy other than the one with which we are concerned, they throw out the whole case. That is the law.

I have no difficulty with that proposition.

MR. J. PANZER: I must take issue with Mr. Edward Panzer here. He says --

THE COURT: You mean now that I just declared it?

MR. J. PANZER: His faith in you justifies him to believe your Honor can explain it. Good, your Honor can explain in good language, in beautiful language, but the jury -- again we are faced with the proposition there are twelve people. Lawyers can't even remember. How is this jury going to separate again, I must say, the wheat from the chaf here? It is an impossible task.

All the explanation in the world isn't going to help, Judge, and you know it. You have remarked to that effect.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Let's get back on the record.

I will say there has been a discussion with regard to the multiple defendants, and I don't hesitate to say that

the law compels the case to proceed in the form that it now asserts itself, but I would be cowardly, I think, and I think that word is well-advised, if I ran away from the challenge of counsel on and off the record, dealing with the great problems that confront the triers of fact, to wit, a lay jury making up the petit jury in this case.

Counsel rhetorically, as well as with utter sincerity, have confronted the Judge with the impossible task, say they, with respect to these multiple defendant cases, and cite the instant case as an overwhelming example of the great difficulty of seeing that justice is done each and every defendant.

We tell the jury they in essence are saying to me that each defendant is entitled to a separate trial. At the very outset I said to the jury in essence that they would be there to tote up the evidence with regard to each defendant separately, that the guilt or innocence of each defendant has to be assayed and estimated by them on the question of guilt or innocence.

I think I would be ducking the issue if I didn't say on the record that I wonder, to put it mildly, that I have misgivings, to put it more frankly, that any lay jury has the capacity intellectually, emotionally, or all the powers that come to the human being except in rare instances,

of allocating, separating, each piece of evidence, and for that matter not only with regard to allocation, but with regard to the totality of the evidence that has spread upon the record.

Furthermore, whether the jury can completely close its mind to that evidence which is to be held only against one defendant and not against others, etc., ad infinitum.

If the equivalent of the challenge to the jury were to be transformed into an accounting office you would have a series of items that would take pencil and paper and all the modern machinery in order to properly allocate and to come up with a certified record. Such is the law, and my opinion is not sought, and my personal opinion has nothing at all to do with what I am compelled as a judicial officer to pronounce.

But to say that I do not share the apprehension of counsel, is to avoid a frank response, and that will do it. I want no further reference to it.

I will resolve this issue and announce it the first thing tomorrow morning.

MR. J. PANZER: What time do we come into court, Judge?

THE COURT: 10 o'clock.

MR. J. PANZER: Good.

THE COURT: Off the record.

(Discussion off the record.)

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THE COURT: On the record.

I forgot to say, Mr. Amorosa, that I amgoing to expect an answer from you tomorrow morning before I make a ruling, and I wouldlike to have your answer on the record what the government's response is to a matter that I have already declared disturbs me no end, and that is whether the government is using this total amount of money found in Lucas' home, whether the government is using it or proposes to use it in connection with other cases involving Lucas and others in connection with conspiracy charges in narcotics cases.

I think that I have been put on notice to the point where I have a right to an answer on that, and I demand it, and I even say to you that if I am not satisfied by it I may very well exclude the evidence even with regard to Mr. Lucas. That is it.

MR CHANCE: May I ask a question, Judge?

I amnot querying your mind but I would like to ask a question for what it is worth. United States v. Jones, I would like to bring that case to you. I assume that you have read it, but I think it is on all fours with this case.

Should I brief it or just give you the case?

THE COURT: You just give me the case.

AFTERNOON SESSION

2.15 P.M.

(In the robing room.)

THE COURT: The government has asked us to reconsider our ruling with regard to prior acts and has given us another memorandum addressed to that whole subject matter. We have examined that memorandum. We find nothing there that we have not already examined with care.

We believe that the government fails to get the Court's position. We think we are right. But whatever it is, we think that the record should be made overwhelmingly clear what it is that motivates us to say that we will not allow Manfredonia to take the stand and what it is that prompts us to rule that the government may never be allowed to establish the conspiracy embraced within the indictment that is before this jury and this Judge by proving the existence of a conspiracy prior to those dates, such dates, by adducing proof that amounts to the establishment beyond a reasonable doubt that such acts did actually come to pass.

The law says distinctly that the Judge is to halt such prior act testimony after there is some testimony along those lines, and it is obvious why the law is so strict, because one can have a weak case in the main and come in with an overwhelming, crushing case of acts prior to that

which confronts the triers of the facts. Look at the danger. No jury is going to be able to prevent the overwhelming impression that such testimony of prior acts brings to bear in evaluating the testimony relating to the case in chief. And so the law says, "Judge, beware. Don't let there be more than sufficient evidence to show the existence of the conspiracy that is embraced within the indictment now before the jury." Manfredonia is going to take the stand, says the government, in order to bolster or add to the weak testimony of the prior acts with respect to at least one defendant. And we say that is exactly what the Court says you must not do; you must not bolster that testimony; that testimony only goes to the existence of the conspiracy alleged in the indictment; it does not go to prove by those prior acts the guilt of any one of the defendants on trial. It is some evidence to be considered by the jury in order to have the jury determine whether in truth and in fact a conspiracy did exist - a conspiracy. And what the government proposes to do, then, is to bolster the testimony with respect to those prior acts by calling a witness who will make a greater impression -- that is the purpose -- make a more reliable impression possibly than the witnesses already called to the stand and from whom there has been extracted testimony with regard to such

prior acts.

We venture to suggest that the government did not think this true and think it true well. Manfredonia should have been called to the stand first and then your already admitted polluted evidence follows. But when you put the polluted evidence on and there is a veritable avalanche of testimony covering the whole situation, from north, south, west and east, from every direction, then you made your choice, because from that witness came all the evidence dealing with the prior acts, overwhelming evidence.

You may say to me that the jury may disregard that evidence. That is not for me to resolve, for all I know, if I let you put Manfredonia on, they may accept the polluted testimony given by those who we all admit have engaged in iniquitous deportment, almost revolting deportment. But that was your choice to make. The issue is what testimony has adduced, not the quality of the testimony, that puts me in the place of the fact-finders. And I cannot take their place. We have seen fit to rule after a thorough study and against the opposition of the defense, which has been persistent and almost violent in its determination, that this evidence should not be received. We have already said we will allow it, and

to the extent to which it has been allowed we have said, "Enough." We see no reason to alter that declaration. In fact, as we see it, if we were to do so, we would violate what we understand and interpret to be the law and make a mockery of our own declarations heretofore recorded.

Accordingly, we rule that we will receive no evidence of any kind from Manfredonia or anyone else with respect to prior acts. We remind you again and again and again that the evidence on the prior acts must merely be sufficient as supportive of the conspiracy alleged in the indictment now before this Court and jury. That amount of evidence we have already indicated has been met, in fact, more than met, and we so stated.

A reexamination of the authorities seems to us to mandate us to follow no other choice. We sum it up by saying that we feel that the strictures laid down by the Appellate Court -- and this is one excellent example -- of supporting and recognizing the great concept announced by Mr. Justice Oliver Wendell Holmes when he said, "We should constantly explore the obvious and stop chasing after the obscure," and when he said that the history of the development of the law has been based not on logic but on experience. Experience shows us the great possibility that

this jury and every jury will be so overwhelmed with the "hot" testimony offered as to prior acts that it will carry over with respect to the testimony relating to the conspiracy embraced within the indictment.

Before this Court and jury I have said it a half-dozen ways. I think you catch by this time what prompts our ruling, and that finalizes it.

(Pause.)

totally unfounded and mouthed by people who themselves have a lot to account for. I call it the way my eyes see it. So this is not overdone. I am telling you why it is. In many cases the Judge wouldn't say a word to you -- bring them out, take them in. And so we are going to spend 20 minutes or so and close the balance of the proof.

I thank you for listening to me. I opened up my heart as well as my mind. I have seen life in the raw pretty much all my life. I have seen the poison that you worry about and that I worry about, and I have done my best to stop it and to expose it, and when I see something clean and upright I hail it, and that is all I have been endeavoring to do.

Very well. Mr. Amorosa, won't you please proceed.

MR. AMOROSA: Yes, sir.

MR. VIRELLA: Your Honor, at this time, pursuant to the stipulation that was read to the jury, I think earlier this morning the government at this time would like to introduce into evidence Government Exhibits 101 through 108, which contains the various sums of moneys that were found at the residence of the defendant Lucas.

Shall I proceed, your Honor?

THE COURT: Please.

MR. VIRELLA: Exhibit 100 for identification

contains $26,042, and it is marked 100.

THE COURT: It is offered in evidence. Mark it in evidence. It is embodied in the stipulation read to the jury.

xx (Government Exhibit 100 was received in evidence.)

MR. VIRELLA: On the government's table, your Honor, there is a blue suitcase which is marked Government Exhibit 101 for identification. This will be offered, your Honor. I will now proceed to open the bag, the suitcase.

THE COURT: First let it be received in evidence. You have no right to open it until it has actually been marked in evidence.

xx (Government Exhibit 101 was received in evidence.)

MR. VIRELLA: Your Honor, may I now open it?

THE COURT: Take your time, sir.

MR.VIRELLA: Government Exhibit 101, yourHonor, contains $281,810. They are contained in various packets, plastic envelopes.

I will proceed to count the number of envelopes.

THE COURT: No. I don't think that is necessary. The jury can see that that contains envelopes of money, and

you might as well close the top of that suitcase and just tell us what those envelopes are made up of.

MR. VIRELLA: They are made up of various United States currency $10 bills, $20 bills, $5 bills, $20 bills. That is the ones I can see on the top, your Honor.

THE COURT: Very well. And they total how much, did you say?

MR. VIRELLA: $281,810.

TEH COURT: Very well, close it up now. The jury has had a general look at it.

Next.

MR.HOFFMAN: If it please your Honor we have no objection to all the various packages. One has been opened already that has been numbered to be deemed marked in evidence at this time.

THE COURT: Yes, but he has to offer them.

MR. HOFFMAN: I thought he did. I am sorry.

THE COURT: Go ahead.

MR.VIRELLA: Your Honor, Government Exhibit 102 marked for identification, a black overnight bag, will be offered at this time.

THE COURT: All right. What does that contain?

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MR. VIRELLA: Your Honor, this is one of the two black bags. That contains $90,975. There is another black bag which contains --

THE COURT: Sir, what does that particular one that you are now asking to be marked in evidence -- what does that contain?

MR. VIRELLA: Your Honor, I will have to open it up.

THE COURT: Don't you know what it contains?

MR. VIRELLA: It contains the currency, your Honor.

THE COURT: You don't know the total amount of it?

MR.VIRELLA: There are two black bags.

THE COURT: You know the total amount of both, is that what you mean?

MR.VIRELLA: Yes, your Honor.

THE COURT: Where is the other black bag?

MR .VIRELLA: It is Government Exnibit 103.

THE COURT: Are you offering that, too?

MR.VIRELLA: Yes, your Honor.

THE COURT: Then you are offering them both at the same time?

MR. VIRELLA: Yes, your Honor.

THE COURT: Very well. The clerk will mark them

in evidence.

xx (Government Exhibits 102 and 103 were received in evidence.)

THE COURT: What does 102 and 103 contain?

MR.VIRELLA: They contain $90,975, and the second bag contains $79,000.

THE COURT: What does that mean, the second bag? I asked you a moment ago if you could tell me what was in one bag and you said you could only give me the total of both bags. What is it, sir?

MR VIRELLA: $169,975.

THE COURT: Do you know what the total is for -- what is in each one of those two bags?

MR. VIRELLA: That would be the total I just recited for the two bags.

THE COURT: Do you know the total for each separately?

MR.VIRELLA: I can't identify as to 103, your Honor. One of the two bags contains $90,975. The other bag contains $79,000.

THE COURT: All right. So the total is what for both?

MR. VIRELLA: $169,975.

THE COURT: Very well. They have been marked in

evidence.

What else?

MR. VIRELLA: Government Exhibit 104 was marked for identification, your Honor --

THE COURT: What does that contain, money, too?

MR.VIRELLA: Yes, your Honor.

THE COURT: Very well. Is that the subject of the stipulation that was read to the jury?

MR .VIRELLA: Yes, your Honor.

THE COURT: Wait until I get through. You are talking at the same time that I do. Is that the subject of the same stipulation read to the jury?

MR .VIRELLA: Yes, your Honor.

THE COURT: Very well. Mark it in evidence, Mr. Clerk, please.

XX (Government Exhibit 104 was received in evidence.)

THE COURT: How much does 104 contain?

MR.VIRELLA: $105,000.

THE COURT: I see n o need to open it but possibly so the record will be clear open it up for a moment, let the jury get a general view of it, and then close it up.

I don't want someone later on to say there was sand

in there, or dead birds.

Let the jury take a general look. Hold it up so they can see it.

(Mr. Virella complied.)

THE COURT: All right. Close it up.

(Mr. Virella complied.)

THE COURT: Next.

I am sorry, sir, how much does that last exhibit contain?

MR. VIRELLA: $105,000.

THE COURT: Very well. What else?

MR. VIRELLA: Government Exhibit 105 marked for identification is a reddish brown bag, your Honor, and we offer it into evidence.

THE COURT: What does that contain, money, too?

MR. VIRELLA: Yes, your Honor.

THE COURT: It is received.

xx (Government's Exhibit 105 was received in evidence.)

THE COURT: What does it contain, 105?

MR. VIRELLA: It contains $1,303.

Your Honor, if you recall in the stipulation there were other sums of moneys, $20, and $105 --

THE COURT: $20 on the closet floor, remember?

MR. VIRELLA: Yes.

THE COURT: It shows you I am listening, doesn't it?

MR. VIRELLA: Absolutely. Yes, your Honor.

THE COURT: What else?

MR. VIRELLA: That would be included in this bag, your Honor.

THE COURT: By this bag you mean Exhibit what?

MR. VIRELLA: Exhibit 105 which is in evidence.

THE COURT: Thank you. Is that the end of the currency?

MR.VIRELLA: Yes, your Honor.

THE COURT: Very well.

Now, will you give me the total again?

MR.VIRELLA: The total sums of money --

THE COURT: In all the exhibits that have just been received.

MR. VIRELLA: $584,705.

THE COURT: Very well. Close to 500 and --

MR. VIRELLA: 84,000 --

THE COURT: Close to $585,000, is that right?

MR.VIRELLA: Yes, your Honor.

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t7 pm

THE COURT: This money is directed by the Court, of ocurse, to be retained by the government, and the jury will understand that is for security purposes. It will be made available to you, as all evidence is, at the appropriate time. If you wish to have it actually physically brought into the jury room, as, if and when the time comes for that, why, I will direct it to be brought in.

Meanwhile, it will remain in the custody of the government.

MR. VIRELLA: We will offer at this time Goverr ent's Exhibit 106 marked for identification, which is a brown suitcase.

(Government's Exhibit 106 was received in evidence.)

xx

THE COURT: Is that the subject of stipulation?

MR. VIRELLA: Yes. This bag contains the various plastic bags that were found in the suitcase.

THE COURT: Would you open it up for just a general view, please. That is not enough. Take out a few of what is in there so the jury can see what you are talking about.

(Mr. Virella complies.)

THE COURT: It is that kind of plastic material?

MR. VIRELLA: Yes.

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THE COURT: What else is in that? What other kinds of content?

MR. VIRELLA: It is all bags.

THE COURT: There it is. That resolves that. It is no mystery. That is all in exhibit what?

MR.VIRELLA: 106.

THE COURT: Thank you.

MR.VIRELLA: We offer, your Honor, Government's Exhibit 107 marked for identification.

THE COURT: Also add, please, subject to the stipulation, because unless you say so, we will have to check it back and all that sort of thing. Is that so?

MR. VIRELLA: Yes, your Honor.

THE COURT: Mark it in evidence.

xx (Government's Exhibit 107 was received in evidence.)

THE COURT: What is it?

MR. VIRELLA: A bottle of lactose.

Finally, we offer Exhibit 108 marked for identification, which is part of the stipulation.

THE COURT: Let it be marked.

xx (Government's Exhibit 108 was received in evidence.)

THE COURT: What is 108?

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MR.VIRELLA: This is the green heat sealing machine.

THE COURT: Itseals the plastic material?

MR.VIRELLA: Yes, your Honor.

Your Honor, that would be the end of the exhibits.

THE COURT: Very well.

MR. AMOROSA: Your Honor, at this time the government enters into a stipulation with the defendant --

THE COURT: Let the jury hear it.

MR. AMOROSA: The government enters into a stipulation with the defendant Soldano through his attorney, Mr. Blossner, that Mr Soldano has lived and lives at 63 Soundview Drive, Port Washington, Long Island, with his family, and that that is approximately a ten-minute ride from Jimmy's Back Yard.

THE COURT: Do you know how long that would take to prove? Possibly a half hour. That stipulation ends it.

MR. AMOROSA: Your Honor, at this time we rest subject to matters that we have discussed with your Honor.

THE COURT: Thank you.

What does that mean, ladies and gentlemen of the jury? There are a few items that have yet to be put in

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CHARGE OF THE COURT

THE COURT: Madam Forelady, Ladies and Gentlemen of the Jury: I would be sadly remiss if I failed at the very outset of this, the Court's charge to the jury, to express to each one of you a keen satisfaction that comes to the Court and to counsel for the undivided attention that you have constantly demonstrated throughout the course of this trial.

It is evident that you have discharged your duty with fidelity. You have followed the testimony with intelligent understanding and absorbing interest. I am quite satisfied that no single matter relating to the factual issues has escaped your attention.

You have been silent throughout and when your turn comes to speak I have every confidence, and I am sure counsel on both sides join me in this, that in accordance with the solemnity of your oath and the high order of your conscience, you will pronounce the justice due in this case.

Your selection was the result of great care exercised by the Court and counsel. Your mission is not easy, and we are sure you did not expect it to be.

A distinguished philosopher, Albert Camus, a Nobel prize winner, summed it up for all of us -- for you,

for the Judge, for counsel -- when he wrote that justice dies from the moment it becomes a comfort, when it ceases to be a burning reality, a demand upon one's self.

We are indebted to counsel, Mr. Amorosa and Mr. Virella for the government, and, in alphabetical order, Mr. Blossner, Mr. Chance, Mr. Epstein, Mr. Goldberg, Mr. Hoffman, Mr. Lang, Mr. Edward Panzer, Mr. Joseph Panzer and his associate Mrs. Oberman, for the defense, for their genuine concern with the interests of their clients. In particular, we are grateful for their demonstration that a day's work well done is always a stimulating experience for participants and listeners alike.

The lawyers are not on trial. They have acquitted themselves with distinction. The evidence and the law applicable to that evidence is what is before you, and you will address yourselves exclusively to that. Whether you like a lawyer or you don't like a lawyer, whether you like the Judge or you don't like the Judge, hasn't a blessed thing to do with your undertaking.

Let me say a word about objections that counsel have interposed from time to time. Please understand that counsel under our law not only have the right but it is indeed their duty on the offer of certain evidence to press whatever legal objections there may be to its admission.

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With those comments about counsel, we take leave of them and we concern ourselves exclusively with the parties involved in this controversy: the government, otherwise known in the law as the plaintiff in this proceeding, and each defendant on the other side.

This is not a contest in salesmanship, it isn't a battle of wits, it isn't a clash of personalities; it is by law pronounced to be a conscientious search for the truth, and if you can leave this courthouse with the firm conviction that your verdict is consistent with the truth, then indeed your duty will have been done, because the only triumph in any litigated case, whether it be civil or criminal, is the triumph of the truth.

As I told you when you were being selected, every defendant -- every defendant, regardless of his race, creed, color, age, regardless of impediments of any kind -- is entitled to a fair trial under our law, and the very same legal propositions of law must be charged by the Court to the jury regardless of who the defendant is, whether he is successful or waiting for success, whether he is ignorant or well informed, crude or polished, highly esteemed or despised, whether he is a member of a good or bad family, yes, even the avowed enemy of our society, each is entitled to his day in court and let justice be done according to the

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facts and according to the law in the case. That is America.

You do not sit here as barons of old, who we used to read about as schoolchildren, the barons who assembled and by whim, favor or caprice, by likes or dislikes, decided who was going to be flung into jail and who went free and who got the bag of gold or who was compelled to resign in abject poverty.

You have no such power, any more than I have. Your duty is to be the judges of the facts and apply the law to the facts no matter who likes it or who doesn't like it, and let the chips fall where they may. You are here to determine the guilt or innocence of each of these defendants separately.

Neither you nor I are here to please or favor anyone. We have a sworn duty to perform and must discharge it if justice is to prevail. After all, it is your justice, your courthouse, for black, for white, for poor, for rich, It is your burden as much as my burden, and you have got to get exercised about the doing of justice as much as the Judge.

We have reached the point where you are soon to undertake your final function as jurors, and here you perform one of the most sacred obligations and responsibilities

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of citizenship. You are, and make no mistake about it, the ministers of justice, as the Supreme Court of the United States has referred to you. You are to approach your duties in an attitude of complete fairness, complete impartiality, and to appraise the evidence calmly and deliberately, and, as was emphasized by me when you were being selected, without the slightest trace of sympathy, bias, or prejudice for or against the government or the defendants who are the only parties to this controversy.

What I have just said is as important a part of this charge by the Court as any other part. Never forget it for an instant, that you and you alone are the sole and exclusive judges of the facts.

Its equivalent is found when it comes to law where the Judge is the sole and exclusive judge of the law. You heard counsel press various legal points before me and when I disagreed you heard me take a definite position. And if I agreed, I said so. You do likewise as to the facts no matter who it suits.

I think I mentioned to you while you were being selected -- and this, too, is a part of America -- that like legions of others I have been on my own since I was ten, and I have lived on both sides of the tracks. I have frozen and gone hungry, and we were moving every month because we

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couldn't pay the rent, and I went down to the railroad tracks and with cupped hands, because we couldn't afford gloves, in wintertime I picked up the pieces of coal that fell from the passing railroad cars and brought those pieces home to feed the potbellied stove.

Don't tell me what it means to go from rung to rung, and the blessedness of this country in affording an opportunity to those who want to climb, climb the legal way, the approved way. And I learned from early days up to this very moment something that many of us forget.

Let us be satisfied with the applause of our own conscience. I don't wany anybody bugling and bowing and scraping before me. I want this little man up here to be satisfied and approve of what I endeavor to do. And that I have a right to insist upon from you, as the judges of the facts, every bit as vital and every bit as important as my function.

You didn't see me sit in a high position and look down on you. Don't let anybody fool you. Your function equals if not exceeds mine because you, not the Judge, decide whether there were these conversations, whether there was this participation, whether this took place or that took place. I don't decide it; you decide it. That's the reason you must be satisfied with the applause of your own

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consciences.

One of the greatest judges that ever sat in the Supreme Court, Mr. Justice Robert Jackson from New York -- and this is a part of the history of that Court -- I got to know him, and one of the greatest regrets of my life is that it didn't come to me to have the privilege of really knowing him more intimately -- he was a great judge. Why? Because he knew the books? No. He knew the books, but much more he knew human beings, he knew life. And as Justice Holmes commented once: "The life of the law is not logic, it is experience."

That was true of Mr. Justice Robert Jackson, who you remember was the prosecutor on behalf of the United States at the Nuremberg trial. Justice Jackson, who is no longer among the living, attended a meeting of attorneys and judges, and during the intermission a group of admiring lawyers gathered around him, and one of them spoke up and said, "Mr. Justice, what do you really expect of a judge?"

And without batting an eye, he said: "I expect him to do his utmost to call them as he sees them as they come across the plate, just the way that umpire is doing at that game going on right now over there."

And if that is true of a judge of the law, it is equally true of you, the judges of the facts. You call

them as you see them. We have a game going on right now. One of the sacrifices of all of us was not to have been able to be spectators on television. What does that game mean? Would it mean that much to us if it weren't played on a clean field? Not a physically clean field. If there was the slightest bit of doubt as to the honesty of the play, and the calling of the play, we would scream our heads off and we would tear at it with our nails.

How much different is it here? It is the same. If this is nothing more than an idle performance, well, then, God help us all. It is a jungle, that's what it will be, and that's what a lot would like to turn it into. I think it is worthwhile, as American citizens, and especially as we approach the two hundredth birthday, to reflect on these points that are a part of the law in this case.

Just imagine where in the whole civilized world will you find what I am about to recite? Only true in America that when the government comes in, the United States Government, with all its power, coming in on behalf of the people of the United States, when it comes into a courtroom our law is that it has no advantage whatever, it is just another litigant, and it is actually called the plaintiff in the law.

The powerful United States of America comes into

court and starts the contest right at the same mark with the defendant. How do you like that?

In every country of the world almost as soon as a case is started the government is already on second base before a word has been uttered. Those who tear at the vitals of America, do they know that proposition of law, do they know the bloody pages of history that it took to bring this into being? We point with pride to it.

And so the fact that the United States Government comes into this courtroom and levels a charge on behalf of the people against each one of these eight defendants now before us, the government starts just where each one of the defendants starts. It has no advantage whatever, but it is entitled to no less consideration than each of the defendants.

Please bear in mind that every word of the Court's charge applies to each defendant separately, for the simple reason that I emphasized to you when you were being selected that guilt is personal. You must find each defendant guilty or not guilty on each of the thirteen counts that confront you, which I hope to develop, and which, if you are patient with me, I shall make you understand so well that you will be ready to undertake a written examination. Otherwise I have failed, because you have to

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apply that law, not some of it but every bit of it, and it is my obligation to get it across.

I can give you some mumbo-jumbo, too; I can give you some fancy language that those of you with your degrees may be able to fathom upon a first reading, but what about someone else on that jury equal to you who hasn't had any formal training? And so it is my purpose to break these propositions down so that each one of the twelve jurors will know it backwards and forwards.

As you know, I just mentioned that there are thirteen separate counts. What does that mean? There was a day when if you charged thirteen separate crimes you would have to have thirteen separate indictments. But in recent years the lawmakers and the jawgivers have said, "Cut out the nonsense. If you've got something to say against a man, say it in one piece of paper, and say it in clear, simple language, and not a lot of uncertainties. Let anybody with an ordinary education read it and understand it."

And so each one of these thirteen counts against these eight defendants on trial is a separate crime charged, and each count, therefore, each charge, must be weighed separately.

You look at the total evidence. You apply the law to that evidence. Then you ask yourself, "On the basis

of all the evidence against this particular defendant No. 1, am I satisfied of his guilt on the facts and according to the law given us by the Judge?"

Regardless of whether two, three, four or five defendants are guilty or innocent, you must weigh the total trial record, all the evidence, against each one.

I use the expression "tote it up" -- t-o-t-e -- a good old English word meaning add it up. Add up every piece of evidence against each one and ask yourself: "Am I satisfied on those facts relating to that particular defendant and on the law given us by the Judge applicable to that total evidence against that particular defendant -- am I satisfied of his guilt beyond a reasonable doubt?" Which I shall shortly define for you.

The law has said the jurors carefully selected have the capacity to separate the totality of the evidence and to apply the evidence as to its weight and apply it to each defendant separately and distinctly. We say with great pride, and we mean it, that all parties, government and individuals alike, stand equal before the bar of justice. Your final role is to decide the fact issues that are in this case. You and only you, not the Judge, not counsel, are the exclusive judges of the facts. You and you alone pass upon the weight of the evidence. You and no one but

you determine the believability or the credibility of each witness. You and no one but you resolve such conflicts as there may be in the testimony of witnesses. And you and only you, the jury, draw such reasonable inferences as may be warranted by the evidence.

It is for you, the jury, yes, the jury only, to make an independent, objective, detached assessment of the total evidence. I venture the suggestion that with all the sincerity in the world even the advocates on either side of the table cannot do that completely, for the interests of their respective clients are bound to rub off onto them, even subconsciously.

So you see why the law names you, the jury, and you alone, to pronounce the last word, so to speak, on what the total trial record points to as the guilt or innocence of each defendant on trial before you.

See how imperative it is that you take the law exclusively from the Judge presiding. Without meaning to mislead you many of counsel for the defense during summation emphasized the point that the case presents no corroboration of the testimony of Perna and Verzino. Some of the attorneys actually used the words "no corroboration."

Well, under the law no corroboration is necessary. To argue that the testimony of Perna and

Verzino is unworthy of belief, and that there is no credible or believable evidence supportive of their testimony, is one thing, but to insist that there must be or should be supportive or corroborative testimony is to add a requirement not countenanced by law.

Or take this example. Counsel have emphasized the corruptability of Perna and Verzino, and well they might. However, you do not consider the testimony of Perna and Verzino in isolation or in vacuum, as it were. It is to be estimated, assessed, and evaluated in conjunction with all the other evidence in the case, including the testimony of the two defendants who took the stand.

The testimony of Perna and Verzino then is to be considered in conjunction with the entire trial record, all the evidence, all the other witnesses, all the stipulations -- and they are important, those stipulations, because they embody proof, evidence -- and all the exhibits, and each of the concessions made throughout the entire trial.

Here's another example. One or two attorneys during summation advanced the thought that the $585,000, approximately, in cash found, along with drugs and other materials, in the presence of defendant Lucas, and received and marked in evidence, is not binding on any other

defendant. It is not as easy as that. I shall develop that later. But for the present let me comment if there actually was a conspiracy, and you so find, and a defendant before you other than Lucas was a willing and knowing member of that particular conspiracy, and further you are convinced that all the cash, or a part of it, and the other materials, were under all the facts and circumstances related to the objective of the conspiracy, that cash and the other materials are as binding on that other defendant as though they were actually found on him or in the premises occupied by him.

After all, there is nothing unusual about the end product of any illegal enterprise. The financial return is the be all and end all of the undertaking. Even when playing a game there comes a time when someone picks up the marbles.

So that's the reason why you pay attention to the law given to you by the Judge, not to well-meaning remarks that might lead you astray. And I rush in to say there was no such intent on the part of any counsel.

This may surprise you, but as a trial judge in the United States District Court I have a perfect right to comment on the evidence. That is unlike what you have heard in the state court. I have the power, if I wish to

use it, in any case, civil or criminal, to say to a jury, after telling them what their powers are, that in my opinion Witness X, who took the stand, was nothing but a corrupt liar, and I wouldn't believe him on a stack of bibles from the floor to the ceiling. All I need to do is add "But you are not bound by my estimate; you are the judges of the facts."

Or I can say of another witness: "In my opinion that witness spoke the gospel truth. But you, the jury, are not bound by my estimate."

I can tell you how I feel about the facts. I can comment on them openly, distinctly pointing out, however, that you and you alone are the judges of the facts.

I shall do no such thing, and I never have. I don't believe that I should praise you, do you honor, rise when you come in -- and why do I do that? As a sign of respect for the enormity of the burden that you carry -- I don't believe that I should praise you, do you honor, speak of you as the ministers of justice, and then invade the orbit of your function. To me, that is talking out of both sides of one's mouth. That is your responsibility and you are going to have to meet it, and I have no doubt that you will.

What more can a judge say than what I told you when you were being selected, that the fact-finding function often proves more burdensome than laying down the law. I know for the greater part of my own life has been spent as a fact finder.

Since I have the power to talk about the evidence and even give you my evaluation of it, I distinctly forbid you from reading into the tone of my voice or the emphasis that I may apply here or there to a proposition of law how the Judge feels about the facts. If I wanted to tell you, I would tell you outright, since I have a perfect right to do it.

I have long fought for the proposition that if you've got something you believe in you go up the front way, don't go sneaking around the back. So that if I wanted to tell you my impression of some of the evidence, I'd come right up the front way, because I've got the power to do it. I don't have to resort to innuendo.

I want to rush in and say don't you dare try to spell out how the Judge feels about any fact by the tone of my voice or the way I move about. My function is to instruct you as to the law, and it is your sworn duty -- you will remember I emphasized it while you were being selected -- to apply the law as I state it to you in these

instructions and apply it to the facts as you, the jury, find them to be.

Your oath compels you to apply the law regardless of your personal opinion as to the wisdom or the rightness of any part of the law. I emphasized that when you were beling selected.

I speak very plainly when I tell you that your oath compels you to apply the law as laid down in these instructions. It is unthinkable that a jury would do otherwise, for that would be the same as a lawyer violating his oath, for which he could be disbarred, or a judge violating his oath, for which he could be removed from judicial office.

You must never forget that you sit here as American ministers of justice compelled by your oath and your conscience to determine the guilt or innocence of each of these defendants based exclusively on the total trial record before you.

What do we mean by the total trial record? The sworn testimony, the exhibits, the stipulations entered into by both sides, and the instructions of the Court.

Now, with regard to any fact matter it is your recollection and yours alone that governs, not what counsel remember or anything that I may comment on. Anything that

counsel either for the government or for the defense may have said with respect to matters in evidence, whether during the trial or in a question or in an argument or in summation, is not to be substituted for your own recollection of the evidence, and so anything that I may refer to, if my recollection doesn't accord with yours, your recollection prevails, your recollection is paramount.

Before we consider each charge against each defendant and what is required to sustain each charge against each defendant, there are certain preliminary observations that are in order, certain principles of law that are applicable to every criminal case, and to some of which I referred at the time of your selection as jurors.

Such is human nature that people apply the term boilerplate to these fundamental principles of law which have been hammered out by blood and sweat and are a part, and a glorious part, of our country's judicial history. They are not boilerplate to me. I have said them hundreds of times, and on each occasion I regard myself privileged to pronounce these sacred propositions of law.

One of them is that an indictment is merely an accusation, a charge. It is a method by which persons accused by a grand jury of crimes are brought into court,

and their guilt or innocence is determined by a trial jury, such as you are. It is no evidence whatever of guilt of a defendant and you will not give any weight whatsoever to the fact that an indictment has been returned against these defendants.

Each defendant here has pleaded not guilty. Each defendant had a right to plead not guilty and the government under our law has the burden of proving guilt beyond a reasonable doubt, which I shall shortly define, as I shall other terms that I use.

We say under our law that the government has the burden of proving each charge, each count, against each defendant, and proving each count as to each defendant beyond a reasonable doubt.

Now, when I say that, that doesn't mean to imply that I think the government has not done so or that the government has succeeded. I have got to lay down these principles of law firmly, and you, the jury, apply those propositions of law to the facts as you find them to be. Remember, I take no position here on the facts.

After all, ladies and gentlemen of the jury, what does the word "instructions" by the Judge mean? The law says the Judge has to instruct you. Does it mean to give you some phraseology and some legal terms which fall on your

ears for the first time and leave you troubled and uncertain? Not at all. It means teach the jury, somehow convey to the jury the essence, the substance, the purport and the directive of each proposition of law applicable in the case.

Just contemplate the glory of our law when it comes to the presumption of innocence, which I mentioned with a great deal of emphasis while you were being selected. I told you that the burden is on the government to prove a person guilty and to prove that person guilty beyond a reasonable doubt, and that burden never shifts from the government to a defendant. The government has to bear that burden throughout the entire trial from beginning to end, from start to finish.

It is our law that a defendant doesn't have to prove his innocence. On the contrary, the defendant is presumed to be innocent of the accusation contained in the indictment. This goes back to the time when men were put on the rack and tormented and tortured and made to give utterances that condemned them to death. And so the very purport and the very sinew of the Constitution of the United States in essence is this: That based on the history of mankind no man shall be made to testify against himself, no man shall have to prove his innocence. If you've got something against

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a man and you charge him, then you prove it, and prove it beyond a reasonable doubt.

If that isn't the glory of a civilized world, tell me what it is. The fact that it isn't upheld and glorified and hammered by those who have the mission to hammer it, and to make it a viable, everyday, tangible concept translated into living performance is not my fault, but that's the law.

And so each of these defendants is presumed to be innocent of each of the charges. That is the law.

The government, of course, says the government is well aware of that presumption. The government is saying to us, in effect, that "We do not evade it, we say that what we have offered as proof establishes the guilt without in any way interfering with that tremendous advantage which the law recognizes that each defendant has, to wit, the presumption of innocence."

So, let's go back. It is a protective shield which covers a defendant. And when I say a defendant I mean each of these defendants, and each of the defendants in the cases I had twenty years ago, and each of the defendants that I will have as long as I draw a breath. And that presumption is in favor of a defendant throughout the entire trial. It is in favor of each of these defendants right now as I

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talk to you. This very moment our law says that shield of presumption of innocence surrounds each defendant during the course of the entire trial. It even continues to shield him while you are deliberating.

It is removed, this presumption of innocence of a defendant, this shield, only when you, the jurors, declare that the guilt has been established beyond a reasonable doubt. Then that protective shield has been pierced, it falls away from the defendant and it no longer affords him protection.

The presumption of innocence is sufficient to acquit a defendant of the crime charged against him unless it is overcome by evidence that satisfies your mind beyond a reasonable doubt of his guilt, and unless you are so satisfied it is your sworn duty to find the defendant not guilty.

If, on the other hand, you do not have a reasonable doubt as to his guilt it is your sworn obligation to find the defendant guilty.

Now, let's go to reasonable doubt. There is no mystery about it. An intelligent high school student can capture its full essence. What does the law mean by reasonable doubt? How much evidence does the government have to place before a jury in any criminal case? Must it

be evidence beyond any possible doubt? Absolutely not. The words are reasonable doubt, and they mean that there is a doubt founded in reason, not imaginary, but founded in reason, and arising out of the nature of the evidence in the case or the lack of evidence in the case. It means a doubt which a reasonable person has after carefully weighing all the evidence. It means a doubt that is substantial and not shadowy. A reasonable doubt is a fair doubt, a doubt which appeals to your reason, your judgment, your common sense, your understanding, and arising from the state of the evidence.

A defendant is not to be convicted on suspicion, conjecture, or even impressive evidence which does not rise to the dignity of significant persuasiveness.

Reasonable doubt is not caprice, whim, speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant or a desire to uphold the government. If after a careful and impartial consideration of all the evidence in the case from start to finish you can candidly and honestly say that you are not satisfied of the guilt of a defendant and that you do not have an abiding conviction of his guilt which amounts to a moral certainty, then you have a reasonable doubt, and in that circumstance it is your duty to acquit.

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On the other hand, if after such a fair and impartial consideration you can candidly and honestly say that you are satisfied of the guilt of a defendant, that you do have an abiding conviction of his guilt which amounts to a moral certainty -- I mean such conviction or certainty as you would be willing to act upon in important and weighty matters in your own personal affairs in your own private lives -- then you have no reasonable doubt, and in that circumstance it is your sworn obligation to convict.

One final word on this subject of reasonable doubt. Reasonable doubt does not mean a positive certainty or beyond all possible doubt. This is not a mathematical problem. You are dealing with human beings, the flesh, the bone, the tissue. If the rule were you had to be satisfied beyond all possible doubt few men, however guilty they might be, would ever be convicted, for it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its very nature is not susceptible of mathematical certainty. And so, in consequence, the test in a criminal case is that it is sufficient if the guilt of the defendant is established beyond a reasonable doubt, not beyond all possible doubt.

Let's take a bird's eye view of the indictment. I will try to delineate essential parts of that at the

appropriate times.

The indictment in this case contains seventeen counts, as I told you. You will be asked in your deliberations to consider only the following counts. You will get a list of them, don't worry about it. It will be all typed up for you.

One, the conspiracy count. That's the first count, in which all of these defendants are named as participants.

And then there are what we call substantive counts: 2, 3, 4, 5, 6, 7, 8, 9, 10, 14, 15 and 16. Each of these counts charges a separate offense or crime, and each must be considered separately.

The indictment names twenty defendants in all, and five additional co-conspirators. Only eight defendants are on trial before you. They are the only persons whose guilt or innocence you must announce in your verdict, although, as I will explain to you shortly, in considering their guilt or innocence you may have to determine the nature of the participation, if any, of the other named defendants.

I repeat: In the determination of innocence or guilt you must bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to him and solely on the

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evidence presented against him, or the lack of evidence.

The case of each defendant stands or falls upon the proof or lack of proof of the charge against him, and not against somebody else.

Now, what are all these charges? Reduced to its simplest term, here's what it amounts to. I told you the first count charges a conspiracy. It charges that all of the defendants together and with others known and unknown to the grand jury conspired to violate the narcotics law. This is called a conspiracy count.

I'll tell you in a bit what we mean by a conspiracy, what the law means. A word just now will help you. It is a plan of two or more people to violate a federal law. That is, in brief, what it amounts to. "Let's get together and agree and become willing and knowing members of an agreement between us to violate the narcotics law." That's it. To do that alone is a conspiracy, as I shall define conspiracy, and that's a separate crime from going out and possessing the drugs.

"Let's get together and take stolen property across state lines. What do you say?

"Okay."

There is a plan to commit a federal crime, which is the illegal transportation of certain properties across

state lines.

"Let's get together and avoid the payment of a tax on beer.

"Okay, count me in."

If all the elements that I will define shortly are present, if they are brought to the attention of the jury by proof beyond a reasonable doubt, that alone is a conspiracy. And if they go and transport that liquor or that beer without tax, that's a separate crime.

Am I getting through a bit? Stay with me, and I'll drive it home.

Now, the remaining counts are what we call substantive counts.

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So these remaining counts are the substantive counts. The conspiracy count here charges that they got together to violate the federal law with regard to the possession of drugs, and the substantive counts charge that they did exactly that, that they did carry out the objectives of the conspiracy, and that is, actually possess with intent to distribute narcotic drugs.

So 1 charges the conspiracy, even though they did not have a bit of drugs, and possession the forbidden drug with intent, knowing, et cetera, et cetera, that is a separate charge.

Do you get it, madam?

And so these substantive counts charge violations of the federal narcotics law in that the defendants named in each count are accused of distributing and possessing with intent to distribute various amounts of heroin and cocaine. I shall go into each count separately.

A conspiracy to commit a crime is an entirely separate and different offense from the substantive crime which is the objective of the conspiracy. The essence of the crime of conspiracy is an agreement or undertaking to violate other laws. So if a conspiracy exists, even if it should fail of its purpose, it is still punishable as a crime. Consequently, in a conspiracy charge there

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is no need to prove an actual violation of the narcotics laws. Just getting together and planning it, that is a crime.

Now, let's go right to it -- and bear with me and see if I can't make this clear. A lot of people have difficulty with conspiracy. And I think if you stay with me we will bring it home to you. I have already told you that the conspiracy count is distinct from the charges made in the remaining counts. This fact, however, does not preclude you from considering proof of an actual violation as evidence that a conspiracy existed. Before you may convict any of the defendants under this count, the following essential elements must be established beyond a reasonable doubt:

First: You must find the existence of the conspiracy charged;

Second: You must find that the particular defendant whose guilt or innocence you are considering knowingly and wilfully associated himself with the conspiracy; and, finally,

Third: You must find that one of the conspirators committed at least one of the overt acts set forth in the indictment at or about the time and place alleged. I shall presently refer to the overt acts.

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If the government fails to establish each essential element beyond a reasonable doubt, you must acquit the defendant on this count; if it succeeds, your duty is to convict him on this count.

Let me give you a crude example of an overt act: A says to B, "I have decided I am going to rob that bank down the street," and B says, "When are you going to do it?"

And A said, "I don't know, but I am figuring on doing it soon."

And B says, "What's wrong with me? Count me in on it."

A says, "Okay. I don't know but what it is best to do it in the evening; I don't know what hours, but let's do it, okay."

So there you have, so far, a combination of two persons, at least, planning to do an unlawful act, that is, rob a bank, which is prohibited by federal law. Further, you have both of them members of that conspiracy. They don't write a letter to each other, go before a Notary Public. All it takes is to have a meeting of the minds. There is no contract with 500 provisions between a gigantic corporation, A, and an international empire, B. You go into a grocery store: "Give me a bottle

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of milk." That is all you say. He hands you a bottle of milk and he gives you some money; he gives you change. There is a complete transaction, a complete contract. You hardly said anything. You might even say "Milk," and that is all. There is a complete contract, a complete meeting of the minds. You want to buy milk; he wants to sell it to you. There it is. That is all it takes. It is the same in a civil transaction as it is in a criminal, and vice versa. But there must be proof, of course, beyond a reasonable doubt that there was such a transaction. I am just giving you this rough example and I am saying that if the proof satisfies the jury beyond a reasonable doubt, that would be a conspiracy, provided there was proof on one other point.

Let me go back to that crude example of mine. B on his own, without telling A about it -- remember, A is the one who made the proposition in the first place -- B gets on the telephone with the bank, a perfectly innocent call, apparently, but with the intent of furthering the objective of the conspiracy, and he says, "What time do you close on Thursday evening?" That is a step that was taken by a member of the conspiracy which constitutes the overt act which the law makes imperative, a step taken to further the object of the conspiracy. It is as simple as

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that.

Suppose two or more persons agree amongst themselves to counterfeit money or to illegally transport alcohol or, as in the case before you, to distribute narcotics, and a single step is taken to further or advance the objective of the conspiracy, the crime of conspiracy has been committed. This is so even though the conspirators actually did not go so far as to actually counterfeit the money, or transport the alcohol, or distribute the narcotics.

If in addition to the conspiracy itself, the conspirators proceed to execute the conspiratorial plan by actually robbing a bank, or counterfeiting the money, or transporting alcohol, and so forth, a separate crime is thereby committed, and that separate crime is what we call the substantive crime.

I don't care what you call it. The point is, that is a crime over and above the conspiratorial crime. So, one is the planning, which is a crime in and of itself, and two is another crime distinct and apart, and that is the carrying out of that plan.

The law is not the ass that people ascribe to it. It is full of human understanding. What is all this thundering about conspiracy? Why is it made a pro-

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hibitive act? Because Congress knows that when people get together to plan to commit or to violate a federal law, there is no end to it. Its ramifications, its tentacles are embedded deep in the very maw of the earth. And to those who do not know what "maw" is, it is a nice English word and that means the very bowels of the earth. And so the law says, "Look out. When you get together and start to plan anything which will be the beginning step of a series of other crimes, you are committing a crime by getting together."

You with the pleasant face, madam, am I getting to you?

And you, are you getting it, sir?

How about you, sir? Do I need press any further?

How about you, sir, are you getting it?

How about you, ma'am?

J.D.?

THE JUROR: Yes.

THE COURT: And you and you? How about you? are you getting it?

Thank you.

We will take a short recess.

(Recess.)

THE COURT: A conspiracy cannot exist without at

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least two persons, whereas the separate crime to carry out the object of the conspiracy can be violated, of course, by one person. Puttingit more simply, it is a crime to conspire or plan to commit a crime, and it is another crime if the plan is carried out. I am going to repeat it backwards and forwards, because my concern that you should get it exceeds my own personal comfort. That is the way it should be. I have no use for those who do not throw themselves heart and soul into their mission, whether it be an advocate or a judge or anyone connected with the judicial system.

Because of its importance to the maintenance of law and order, an explanation of an unlawful conspiracy requires a word or two of background. Collective criminal agreement, that is, partnership in crime, creates a greater potential threat to the public than the lone wrongdoer.

Remember the example I gave you of the ugly creature with his tentacles. Once those tentacles begin to spread, it takes time to lop off every one of those tentacles. Those tentacles represent the substantive acts that follow upon the completion of the conspiracy or the carrying out of the conspiracy's objectives. So the law says that is harder to detect, that combination,

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than the wrongdoing of the lone wrongdoer.

Concerted action for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. / Group association increases the likelihood and that the criminal objective will be successfully realized and renders detection more difficult than the instance of a sole aggressor./

It was because of these and other reasons that Congress made a conspiracy or concerted action to violate a federal law a crime entirely separate, distinct and different from the substantive law which may be the object of the conspiracy.

These defendants, therefore, are charged with conspiracy, together and with others. What then, is the legal language? I will give you simple examples, and then I am going to give you the legal language.

In essence, it is a crime to conspire to plan to violate a federal law. I repeat, there is no need here to prove an actual violation of another federal law. In other words, it is not necessary to show that the conspiracy succeeded. Two or more persons may agree to violate a federal law. That alone constitutes, in essence, the crime of conspiracy. If they actually violate the law

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they conspired to do, that constitutes another and separate and distinct crime. In order to find the defendants guilty on the conspiracy count, the government has the burden of proving beyond a reasonable doubt the three elements that I have already mentioned, and it must prove every one of these three elements beyond a reasonable doubt. Let me give them to you again:

The first element, that the conspiracy alleged in the indictment existed, second, that the defendant, and this applies to each one of them -- and you put the test to each one -- that the defendant was a willing and knowing member of that conspiracy. That, too, must be proved beyond a reasonable doubt; and, thirdly, that a step was taken to further or carry out the objective of the conspiracy.

A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a criminal or unlawful purpose.

Now, there may be one of you who has not quite got this, and that is enough to cause me to expend myself gladly. It is my duty.

The gist of the crime is that unlawful agreement or combination to violate the law. A conspiracy is sometimes called a partnership in crime in which each member becomes

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the agent of every other member.

The law goes on to say, to establish a conspiracy the government is not required to show that two or more persons sat around a table and then entered into a solemn pact orally or in writing stating that they had formed a conspiracy to violate the law and setting forth the details of the plan, the means by which the unlawful project was to be carried out, or the part to be played by this one or that one who are the conspirators. That is silly. Your common sense will tell you that when men, in fact, undertake to enter into a criminal conspiracy, much is left to the unexpressed understanding. Conspirators do not actually reduce their agreements to writing or acknowledge them before a Notary Public, nor do they broadcast their plans. From its very nature a conspiracy is almost invariably secret in its origin and its execution.

It is sufficient if two or more persons in any manner, through any contrivance, impliedly or tacitly, come to a common understanding to violate the law.

Sometimes, as I gave you in the example of robbing a bank, that requires only a few words. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

In determining whether there has been an unlawful

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agreement, you may judge the acts or the conduct of the conspirators which are done in an apparent attempt to carry out a criminal purpose. The old adage, "Actions speak louder than words," is certainly applicable here. Thus, dealing with the first element which must be proven beyond a reasonable doubt, that is, the existence of the alleged conspiracy, you are not to dismember it and view its separate parts, but you are to look at it as a whole, consider all the evidence, from start to finish, all the evidence which has been admitted with respect to the conduct, the acts, the declarations of each of the alleged parties, and such inferences as may reasonably be drawn from those circumstances.

If on the basis of the sum total of such evidence and the reasonable inferences to be drawn from it, you are convinced that the minds of at least two alleged conspirators met in an understanding way, in an agreement to seek to achieve the unlawful purpose I have already pointed out to you, then this element of the offense is established.

In this connection it is not necessary for the government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. I repeat: Persons may be guilty as parties to a conspiracy

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even though the objectives they undertook to achieve were never accomplished.

Usually the only evidence available is that of disconnected acts on the part of the alleged conspirator, which acts, however, when taken together in connection with each other show a conspiracy or agreement to secure a particular result as satisfactorily and as conclusively as more direct proof.

If you find that the parties got together, then, to accomplish something unlawful, then a conspiracy is shown, even though you may find the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others, so long as those acts were done to carry out the same objective of the conspiracy. Not everyone does the same job. The man on top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom runs the errands, but each one of them, if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy.

As I told you during the course of the trial,

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and as I told you in that rough example where they were talking about robbing a bank, with B getting on the telephone unknown to A, A not knowing B made a telephone call, to find out about the hours of the bank, the evening hours, that is binding on A as though A made the call himself. Not everyone does the same job. The man on the top does one kind of job, the fellow next to him has a different kind of function to perform, and the fellow way down at the bottom in the example I gave you during the course of the trial, runs the errands. But if each one of them knows what the objective of the conspiracy is and is a willing and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence, if done in connection with the furtherance of the objectives of the conspiracy. That is another way the law says, "If you do it, mister, don't come in here crying you didn't know that the other fellow went that far, or went in that direction, or did this or that; you are bound by it whether you knew it or not, as long as it was done in furtherance of the very objective of the conspiracy that you, mister, knew about and participated in, were a willing member of."

Then, finally, I tried to put it another way. Each conspirator need not know of every act done in furtherance of the conspiracy by the other co-conspirators in order to

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have a conspiracy exist. Under the law, a conspiracy once formed is assumed to have continued until its object has been accomplished or it hasbeen abandoned by all its members, or it has been frustrated, as by arrest, or unless there is affirmative proof offered of withdrawal or disassociation.

In determining whether the charge of conspiracy has been made out in this case, it is your task, and your task alone,on this first element of the conspiracy to judge the total picture of the asserted acts and conduct of the alleged conspirators which are claimed to have occurred for the purpose of forming and promoting the criminal agreement and seeking the alleged criminal objective.

Like many or most of the things in the law, a conspiracy is not required to be established by so-called direct evidence. The unlawful agreement or understanding which, as I have said, is the heart of the matter, may be found, if it is found at all, as a matter of inference from the conduct of the people alleged to have comprised or participated in the conspiracy.

And so, ladies and gentlemen of the jury, if you conclude that the conspiracy as charged existed, you must next decide whether the defendant -- and this applies to

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each defendant, remember -- was a member of that conspiracy. That element, too, as I have pointed out already many times, must be established beyond a reasonable doubt, as I have defined reasonable doubt for you.

In short, whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the evidence in the case, including the evidence that you heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators. Putting it more succinctly, the government must prove that the defendant knowingly and wilfully joined the conspiracy during the period of its operation with the intent and purpose of furthering its objectives.

I want to caution you that mere association with one or more conspirators does not make one a member of a conspiracy. Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient without more to establish that a defendant was a participant in the conspiracy or aided and abetted the crime. Likewise, mere presence at conspiratorial discussions and knowledge of the existence of the conspiracy are not sufficient by themselves and without more to establish that a defendant was a member of the conspiracy.

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In other words, in order to convict, you must find from the total trial record that he was a participant in the conspiracy, and not merely a knowing spectator. You must focus upon the defendant's relationship to the crime, and not solely upon his relationship with others accused of committing the crime. His relationship to the crime must be sufficiently substantial to satisfy the concept of personal guilt.

What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful ends. Now, that does not necessarily mean that he has to do what we call spade work. He can get on the telephone, make a couple of calls, and he is as much a member of the conspiracy as the fellow who is doing something every other minute in connection with the furtherance of the conspiracy, so long as the defendant in making that telephone call, or whatever other simple thing he may have done, was a member, a knowing member, a willing and knowing member of the conspiracy.

A defendant may not know all of the conspirators, yet if he knows there is a conspiracy and if he has knowledge of its basic common objectives and aims and joins it, then he adopts as his own the past and future words and

acts of all the other conspirators in furtherance of the conspiracy, as he understands it, even though he may not have been present when the words were said or the acts were done.

A person becomes a member of a conspiracy by associating himself, however informally, with the common plan or scheme, knowing the central aim or principal purpose of the overall plan or scheme and intending to aid in some way, even a minor way, to bring out the success of the plan or scheme, and hence it comes about that you have the captains and the lieutenants and the fellow on the lowest rung of the ladder. I don't think I need to expand upon it every time there is a conspiracy involving such personages, the captain does not call in the little fellow and tell him all the details of each step that is going to be taken. The test is whether each one of them knows the aims of the conspiracy and participates therein to some extent.

And so, the basic question is, what was the scope of and nature of the agreement as the defendants saw it? What persons and what kinds of activities did he have a good reason to believe were involved in furtherance of the aim of the conspiracy? Knowledge is a matter of inference from the facts proved. It is not necessary that

a defendant be fully informed as to the details of the scope of the conspiracy in order to justify an inference of knowledge on his part. To have guilty knowledge, a defendant need not know the full extent of the conspiracy and all of its activities and actors. However, there is need to find, and find beyond a reasonable doubt, that a defendant charged with a conspiracy had knowledge of the general illicit purpose of violating federal law.

Accordingly, to find a defendant before you guilty under the conspiracy count, you must find that he entered into the conspiracy with specific criminal intent and knowledge. The only way you have of answering or arriving at the state of mind of a defendant in the case before you is to take into consideration all the facts and circumstances shown by the total evidence.

I repeat, direct proof here with regard to wilful or wrongful intent or knowledge is not necessary. They may be inferred from acts or a combination of acts. These are questions of fact to be determined from all the circumstances by you, and you alone.

I repeat, a conspirator need not know all the members of the conspiracy. A conspiracy and a defendant's participation therein may be inferred from such facts and circumstances in evidence as logically tend to sustain that

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inference. The independent evidence of illicit association in a conspiracy may be totally circumstantial. To find any defendant guilty of conspiracy, you must find that he knowingly and intentionally participated therein. This means that a party acted deliberately and with knowledge and purposely participated therein, intending to violate the law, rather than through inadvertence, mistake or negligence.

In determining whether or not a defendant, or any other person was a party to or member of such a common plan, the jury are not to consider what others may have said or done. That is to say, the membership of a defendant, or any other person, in such a common plan must be established by evidence as to his own conduct -- that is, what he himself knowingly said or did.

If and when it appears from the evidence, direct or circumstantial, in the case that such a common plan did exist, and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member, may be considered by the jury as evidence in the case as to the defendant found to have been a member, even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or conspiracy, and in furtherance of some intended object or purpose of the plan.

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Otherwise, any statement or admission made or act done by one person, outside of court, may not be considered as evidence against any person who was not present and did not see the act done, or hear the statement made.

To sum it up, the government must establish beyond a reasonable doubt that a defendant, aware of its purposes and objects, entered into the conspiracy with a specific criminal intent, that is, that a defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Should you find that a conspiracy existed and that based on proof of its actual participation therein a defendant was a member, and that is established beyond a reasonable doubt then the acts and declarations -- and I know this sounds repetitious -- then the acts and declarations of any other person you may find was also a member of the conspiracy made during its pendency and in furtherance of its objectives are considered to be acts of all the current members, even though they were not present.

This is so because when persons enter into a conspiracy to accomplish an unlawful end they become responsible for one another in carrying out the conspir-

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acy and thereafter the acts and declarations of others whom you find to be members of that same conspiracy may be considered against the defendant if you find the defendant to be a member of the conspiracy when those acts or declarations occurred, and if those acts are done and declarations made in furtherance of that very same conspiracy.

We come now to the law on overt acts.

I gave you the simple example, that rough example, of a telephone call made, what hour does the bank close in the evening? That is an overt act made in order to carry out or further the objective of that conspiracy between A and B to rob the bank.

And so we come to a more detailed enlargement. Of what the law means by overt acts. That is the third element of the conspiracy count that you must consider, and that must be established beyond a reasonable doubt, as I defined reasonable doubt for you, like each element, and that is whether an overt act took place.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspirators.

What is the overt act? I have already indicated to you it is anystep or any action or conduct, even innocent

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on its face, like a telephone call, which is taken to achieve, accomplish or further the objective of the conspiracy.

The purpose of requiring proof of one overt act is another example of the understanding of the legislators of human behavor. Why do they insist that there should be an overt act in order to complete the crime, and without the overt act proven beyond a reasonable doubt a defendant must be acquitted?

For the simple reason that the overt act shows the intent to go forward with the plan, that they didn't abandon it, that A and B didn't talk about robbing the bank and then said "Oh, let it go."

But when one takes a step that shows that they were determined to go forward, that the plan was not abandoned, that it was being translated into tangible overt action.

Thepurpose of requiring proof of one overt act is that while parties might conspire amd agree to violate the law they may change their mainds and do nothing to carry it into effect, in which event it will not constitue an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant

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under consideration.

Let me read you an example of an overt act. They are all in the indictment and you are going to get them. They are on three legal sheets among 24 in number, and I don't propose to read them except to give you an example here and there.

"One: In or about February 1973 defendant Ernest Malizia met co-conspirator Mario Perna at the Evergreen Bar at 490 Fifth Avenue, Brooklyn, New York, and had a conversation.

"Two: In or about February 1973 defendants Ernest Malizia and Frank Pallatta, also known as 'Bolot', also known as 'Nose', met in the Bronx, New York, and rode in an automobile.

"3. In or about March 1973 Defendant Frank Pallatta, also kown as 'Bolot', also known as 'Nose', met defendant Ernest Malizia and co-conspirator Mario Perna at the Raceway Diner in Yonkers, New York, and discussed narcotics."

Those are the alleged overt acts. I repeat: Some of them are perfectly innocent on their face, but the government must under the law allege some, but not all, of what it contends are the overt acts.

You see, I repeat again, that parties may conspire

and agree to do an unlawful thing, and they may change their minds and not go through with it and drop it and pull out of it right away, and so the law says when you do an overt act, however, in furtherance of it, that shows you were in it, to use the vernacular, you had not abandoned it, you undertook to fulfil its object.

The prosecution under our law, is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendants' participation therein, nor is it required to prove each overt act which may have occurred during the furtherance of the conspiracy. It is required to prove at least one such act did take place. The overt act or step essential to sustain a conspiracy need not implicate all the conspirators nor is it required that each of the conspirators participate in or commit that particular overt act. It is sufficient that such overt act was performed by any one or some of the conspirators. This is so since the act of one conspirator, as I have already pointed out, done in furtherance of the conspiracy, becomes the act of all the conspirators.

The guilt of a conspirator is not measured by the extent or the duration of the participation in the conspiracy, nor is it necessary that he received a

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pecuniary benefit for his participation. That is the law. If a defendant participated in the conspiracy to a more limited degree than others, or if he received less benefit than others, he is equally culpable so long as he was in fact a conspirator.

As alleged in the indictment, the conspiracy commenced on or about January 1, 1973, and continued until on or about July 10, 1975. It is the law that the government need not prove that the conspiracy existed over the whole course of time which is alleged in the indictment; the duration of a conspiracy may be very short, it may be very long, it may last even for many years, or during parts of each year.

You must bear in mind that once formed a particular conspiracy must retain throughout its existence the same basic agreement and the same objective present when the conspiracy started. It must be the same conspiracy, not some other conspiracy.

If you don't find such a single overall conspiracy, the government will have failed to establish the single overall conspiracy as charged in Count 1.

If you find that within that period all the elements of this crime have been demonstrated to your satisfaction beyond a reasonable doubt, as I have defined

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reasonable doubt for you, then that crime becomes complete.

Having endeavored to drive home the significance of these propositions of law which you must -- not may -- must follow and apply, let me read you -- because now you have the meaning now these words will mean something to you, I hope, I feel confident -- the exact language of Count 1 in the indictment.

The grand jury charges from on or about the 1st day of January 1973 and continuously thereafter up to and including the date of the filing of this indictment in the Southern District of New York Joseph Magnano, also known as Joe the Gr[illegible]nd, Frank Pallatta, also known as Bolot, also known as Nose, Firhard Bolella, Louis Macchiarola, also known as Red Hot, Michael Carbone, Dominic Tufaro, also known as Donnie Boy, Frank Ferraro, also known as Skooch, Carmine Margiasso, also known as Charlie, Anthony DeLutro, also known as Tony West, Anthony Soldano, also known as Tony, Joseph Malizia, also known as Patsy Pontiac, Ernest Malizia, John Gwynn, William Chapman, also known as Chappy, St. Julian Harrison, Frank Lucas, Gerard Cachoian, also known as Coco, Roberto Rivera, and Gabriel Rodriguez, also known as Cass, also known as Cassanova, the defendants, and Frank Caravella, Alex Pulphus, Joseph Condella, Jose Ramos, Mario Perna and Anthony Verzino, named herein as

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co-conspirators, but not as defendants. and others to the grand jury unknown, unlawfully, wilfully, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Sections so and so and so and so -- and those are the sections dealing with the illegal possession of prohibited narcotic substances.

The conspiracy goes on.

Two: It was part of said conspiracy that the said defendants unlawfully, wilfully, and knowingly, would distribute and possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substanc s, the exact amount thereof being to the grand jury unknown, in violation of Congressional Act No. such and such and such and such.

I have a feeling of contentment that this reading falls upon understanding ears.

And then is set forth the overt acts in three full pages.

Let me take up the subject of multiple conspiracy. Someof the defendants have contended that the government's proof fails to show the existence of the one overall conspiracy which this indictment charges. They argue that no conspiracy existed, or if in fact one did exist then at best the evidence shows several separate and independent

conspiracies involving various groups of the defendants.

Proof of several separate conspiracies is not proof of the single overall conspiracy charged in the indictment unless one of the several conspiracies proved is the single conspiracy which the indictment charges.

So what you must first do is determine whether the conspiracy charged in the indictment existed between two or more conspirators. If you find no such conspiracy existed then you acquit. However, if you are satisfied that such a conspiracy existed you must determine who the members were of that conspiracy. If you find that a particular defendant is a member of another conspiracy, not the one charged in the indictment, you must acquit that defendant.

In other words, to find a defendant guilty you must find that he was a member of the very conspiracy charged in the indictment and not in some other conspiracy.

In determining whether a given conspiracy exists you may consider what the evidence shows as to the changes of personnel and activity. You may find a single conspiracy even though there were changes in personnel or activities, provided you find that some of the conspirators continued throughout the life of the conspiracy and that the purposes of the conspiracy contin-

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ued to be those charged in the indictment.

The fact that the parties are not always identical does not mean that there are separate conspiracies. In other words, if at all times the alleged conspiracy had the same overall primary purpose and the same nucleus of participants the conspiracy would be the same basic scheme even though in the course of its operation additional conspirators joined in and performed additional functions to carry out the scheme while others were not active or had terminated their relationship.

If you decide that the conspiracy charged in the indictment existed between any of the defendants you must then decide as to each defendant individually whether he joined the conspiracy with knowledge of any of its purposes.

In determining whet her any defendant was a party each is entitled to individual consideration of the proof respecting him, including any evidence of his knowledge or lack of knowledge, his status as a partner, or supervisor, his participation in key conversations, his participation in the plan, scheme, or agreements alleged.

Does that come through?

The law on conspiracy is clear, but a conspiracy

itself is an unusual, unique and characteristically exceptional type of offense. In spreading a net to catch the participants the main operatives as well as the so-called little guy may be scooped up. The evidence as to some, including the big and little, may meet the test warranting conviction, while the test as to others may be insufficient. The big as well as the little may escape altogether from the net. The net may hold the small but not the big, or the big and not the small, or some of both.

As the United States Court of Appeals observed "When the government throws out its big conspiracy net to catch the big fish in the criminal sea it has to be aware that an occasional minnow may wriggle free."

We now come to consideration of the law respecting the substantive counts. My burden to convince you with regard to each proposition of law remains the same until the last word, but I think I can say that the heaviest part of the total charge is behind us.

Let me read you the indictment as it relates to the substantive counts -- that means the counts other than the conspiracy count.

The second count -- and I will read you the pertinent language -- the grand jury further charges in or about March 1973 in the Southern District of New York

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Joseph Maganano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bolella, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro also known as Donnie Boy, Frank Ferraro also known as Skooch and Carmine Margiasso also known as Charlie, the defendants, unlawfully -- here it is -- this is the language, repeated over and over again, in the substantive counts -- unlawfully, wilfully, and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substnace, to wit, approximately 2 kilograms of heroin.

The third count: The grand jury further charges: In or about March 1973 in the Southern District of New York, Joseph Magnano, also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bollela, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro, also known as Donnie Boy, Frank Ferraro also known as Skooch and Carmine Margiasso also known as Charlie, the defendants -- here again -- unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 4 kilograms of heroin.

The fourth count.

The grand jury further charges:

In or about November 1973 in the Southern District of New York, Joseph Magnano also known as Joe the Grind, Frank Pallatta, also known as Bolot, also known as Nose, Richard Bolella, Louis Macchiarola also known as Red Hot, Michael Carbone, Dominic Tufaro also known as Donnie Boy, Frank Ferrar also known as Skooch and Carmine Margiasso also known as Charlie, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug.

What is it this time? How much? The charge is 12 kilograms of heroin.

The fifth Count:

The grand jury further charges:

In or about March 1973 in the Southern District of New York, St. Julian Harrison and Frank Lucas the defendants, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

The sixth Count:

The grand jury further charges:

In or about October 1973 in the Southern District

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of New York, Frank Lucas the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute Schedule 1 and 2 narcotic drug controlled substnaces, to wit, approximately 4 kilograms of heroin and 2 kilograms of cocaine.

The seventh Count:

The grand jury further charges:

On or about the 1st day of December 1973 in the Southern District of New York, Frank Lucas the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 10 kilograms of heroin.

The eighth Count:

The grand jury further charges:

In or about November 1973 in the Southern District of New York, Anthony DeLutro also known as Tony West, the defendant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 5 kilograms of heroin.

The ninth Count:

The grand jury further charges:

In or about January, 1974 in the Southern

District of New York, defendants Anthony Soldano also known as Tony, and Joseph Malizia also known as Patsy Pontiac, the defendants, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately 3 kilograms of heroin.

The tenth Count:

The grand jury further charges:

In or about March, 1973 in the Southern District of New York, Johnny Gwynn the defendant, unlawfully, wilfully and knowingly did possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, approximately one-quarter kilogram of heroin.

Now we go to 14, the fourteenth count.

The grand jury further charges:

On or about October 30, 1973, in the Southern District of New York, the defendant, John Gwynn, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, 159.5 grams of cocaine.

The fifteenth Count:

The grand jury further charges:

On or about the 20th day of December 1973 in the Southern District of New York, John Gwynn, the defendant,

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unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 2 narcotic drug controlled substance, to wit, 151.5 grams of cocaine.

The sixteenth Count:

The grand jury further charges:

On or about the 15th day of January, 1974, in the Southern District of New York, John Gwynn, the defnedant, unlawfully, wilfully and knowingly did distribute and possess with intent to distribute a Schedule 1 narcotic drug controlled substance, to wit, 148.5 grams of heroin.

Why don't I say to you, here it is, here is the indictment, take it, take it into the jury room. You can have it any way, whether I say it or not you go and read it for yourself. Because that would be a way of shoving on to you the burden that is unwarranted. You have enough of a burden.

What is the statute with regard to substantive acts? Having read you the language of the indictment repeated over and over and over again you have have seen how the indictment follows the statute, the Congressional Act. The statute which the defendants are alleged to have violated in addition to the conspiracy statute, here it is, in pertinent part:

"It shall be unlawful for any person knowingly

or intentionally to distribute or ... to ... possess with intent to distribute a controlled substance..."

Simple, right to the point. There it is.

Mr. Man, woman, you do that, you violate that law. It says that it shall be unlawful for any person knowingly or intentionally to distribute or to possess with intent to distribute a controlled substance.

Now, what must the government prove beyond a reasonable doubt in order to sustain a charge such as I have read you in each one of those counts?

I told you what the government had to prove beyond a reasonable doubt in order to establish a conspiracy. Now let me tell you what the government must establish beyond a reasonable doubt in order to establish the crime of the substantive count. Of course what I say as to one applies to each one of the counts.

What must the government prove?

Before you can find the named defendants guilty of the crimes charged in these counts of the indictment you mst be convinced beyond a reasonable doubt that the government has proved the following elements:

One: Tha on or about the dates set forth in each count the defendant or defendants named in that count distributed or possessed with intent to distribute

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a narcotic controlled substance.

The second element that must be proved beyond a reasonable doubt: That they do so unlawfully,wilfully and knowingly.

The third element that must be established beyond a reasonable doubt is that the substance which the defendant or defendants named in the count possessed was in fact a narcotic drug controlled substance.

I will say a few further words on these elements in just a moment. I don't think you are going to have much trouble, of course, with the third element. There were stipulations with regard to that, but nevertheless yours is the obligation to resolve that third element as well as the first and second.

Let us take up the first element. You will note that the first element of the offense is "Distribution of the drug or possession with intent to distribute the drug. "

What does that phrase mean? The word "distribute" means the actual constructive or attempt to transfer of the drug. The word possess has its common every day meaning, that is to have something within your control. It does not necessarily mean to have it in your hand or pocket. Control may be demonstrated

by the existence of a working relationship between the person having such control and the person with actual physical custody.

15 people rob a house and take a diamond and one of them holds the diamond. Does that mean that the other 14 haven't actually possession of it, that they don't also hold it in their hand? See how stupid that would be.

And that word "intent" refers to a person's state of mind, and so the term "possess with intent to distribute"can be fairly stated to mean to control an item with the state of mind or purpose to transfer that item.

On this element the government contends that it has proved beyond a reasonable doubt that the defendants knowingly transferred the drug and possessed the drug and that at the time they possessed it their mental state was such that they would transfer it to someone else.

If you find beyond a reasonable doubt that such transfers were made I charge you that each such transfer satisfies this requirement of the statute.

Now, let us go to the second element that must be established beyond a reasonable doubt. The terms "unlawfully, wilfully and knowingly" mean that you must be

satisfied beyond a reasonable doubt that the defendants knew what they were doing and they did it deliberately and voluntarily as opposed to mistakenly or accidentally or as a result of some coercion.

Of course, it is not necessary that the defendants knew they were violating any particular law. Rather, it is sufficient if you are convinced beyond a reasonable doubt that they were aware of the general, unlawful nature of their acts.

Now, let us go to the third element which must be proved beyond a reasonable doubt, that the narcotic drug controlled substance is either heroin or cocaine. I instruct you as a matter of law that heroin and cocaine are narcotic drug controlled substances mentioned in the prohibited act enacted by Congress and made a law.

You, however, must still find beyond a reasonable doubt that the substance is heroin, or cocaine as charged in the specific count.

As I have previously instructed you it is not necessary in order for the government to prove its case of conspiracy to violate the narcotic laws that there be proof of actual dealings in narcotics. All that need be proved is that unlawful agreement and an overt act committed in pursuance of the agreement. The conspiracy

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is a crime in and of itself separate and apart from the crime of importation, purchase, sale, and transportation of narcotics.

I can hear you almost say "If you say that again I am going to scream, Judge."

I hope that's the last time. The rule is otherwise, however, with regard to the substantive violations of the narcotics laws, about which I am now instructing you. Here you must be convinced beyond a reasonable doubt that the substance possessed or distributed was in fact a narcotic drug.

It is not necessary that that be proved by direct evidence. Just as with any other component of the crime, the existence of and dealing with narcotics may be proved by circumstantial evidence. There need be no sample placed before you, nor need there be testimony by qualified chemists, as long as the evidence furnishes ground for inferring that the material in question is narcotics.

There are several categories of circumstantial evidence which you may consider as to whether a given defendant has possession of the narcotic drug as charged in each substantive count. One, the testimony that someone had personally tested samples of the powder from each shipment.

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Two, the secrecy and deviousness with which the transactions were handled, such as code words, concealment of the substance, and so forth. Three, the fact that the substance in which they were dealing was a white powder. Four, the high prices paid in cash for the substance.

Five, the lack of complaint on the part of the purchasers. Six, descriptive language used by certain transactions. Seven, the white powder in evidence which counsel stipulated to be heroin hydrochloride.

My throat is getting a little sore. We will take a few minutes recess.

(Recess.)

Before I conclude this portion of the charge there is one other statute that I must discuss with you.

It is not necessary for the government to show that the defendant you are considering physically committed the crime himself. It is also a crime, however, not only to commit the illegal acts to which I referred but to aid or abet or procure or induce another person to commit such acts. That is based on what we call the aiding and abetting statute, and it is very simple. Here it is:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

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That statute, therefore, provides that a person who aids and abets another to commit an offense is just as guilty of that offense as if he committed it himself. Accordingly, you may find a defendant guilty of the offense charged in Counts 2, 3, 4, 5, 14, 15 and 16 of this indictment if you find beyond a reasonable doubt that another person committed the offense charged in those counts and that the defendant you are considering aided and abetted that person in effectuating it.

To determine whether a defendant aided and abetted the commission of an offense you should ask yourself these questions. Did he associate himself with the venture, did he participate in it as something he wished to bring about. Did he seek by his actions to make it succeed?

If he did, then he is an aider and abetter.

Of course, to find a defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime was being committed. For a mere spectator, as I have told you already, it not a participant. But in order to convict it is not necessary that you find that a defendant himself did all of the criminal acts since participation in the crime can be found if you find he aided and abetted, in other words, that he assisted another in committing it.

After all, it is not uncommon that in any combination of persons to achieve a common goal, legal or illegal, each person has a different -- and I keep repeating this -- not a duplicating job to do in going about the attainment of the common purpose.

So the law provides that anyone who knowingly aids or abets another in any manner in the commission of a crime is equally guilty of the commission of that crime and is himself a principal and may be charged directly with the commission of a crime as principal and convicted upon such charge, although the evidence indicates that he only aided and abetted in the commission of the crime, and did not have a major part in the undertaking.

He aids and abets if knowing the crime is being committed what he does actually helps make it possible or cause the commission of the crime.

Now let us go further . Counts 2, 3, and 4 of theindictment charge Joseph Mangano, Frank Pallatta, Richard Bolella, and five others who are not on trial, with the substantive offense of distribution of heroin and possession with intent to distribute heroin. There is another way that you may find these defendants guilty of these three substantive counts besides under the principles I have just given you relating to aiding and

abetting.

If you find that a conspiracy to distribute heroin existed, that these three defendants were members of it, and that the offenses charged in Counts 2, 3 ard 4 were actually committed by another member of the same conspiracy in furtherance of the overall plan, you may find these three defendants guilty of these substantive offense, even if they were not physically present at the time that the offenses were committed.

In other words, if you find beyond a reasonable doubt that the persons identified as Skooch and Charlie were members of a conspiracy to distribute or sell heroin along with Magnano, Pallatta and Bolella you may find Magnano, Pallatta and Bolella guilty of these three counts if you determine that Skooch, or Charley physically distrib uted the heroin in furtherance of the conspiracy.

The same principle applies with respect to Count 9. This count charges the defendant Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin.

You will recall that government witness Verzino testified that Mr. Soldano sold him this heroin, and that the actual delivery took place in Queens,

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New York, Queens, New York, is not in the Southern District of New York. You may find Soldano guilty of this charge, however, if you find beyond a reasonable doubt that he was part of the conspiracy to distribute heroin along with Verzino and that he sold this to Verzino and that Verzino took the heroin into the Southern District of New York, which includes Manhattan and the Bronx, with the intention of distributing it. In other words, if you find that Soldano was a member of the conspiracy as charged along with Verzino, and he gave the heroin to Verzino, and that Verzino took it into the Southern District of New York with the intention of distributing it, you may find Soldano guilty of Count 9.

We come now to the words unlawfully, wilfully and knowingly. They charge the defendants with having unlawfully wilfully and knowingly committing the offenses set forth there. Although these words define themselves nevertheless they are set forth in the counts of the indictment, they have been repeated over and over again, so as to make certain no one would be convicted because of mistake, inadvertence or other innocent reason. So by use of these words unlawfully, wilfully and knowingly the government must prove beyond a reasonable doubt a specific intent to commit a crime before there can be a conviction as to each

count in theindictment. An act or failure to act is done knowingly if done voluntarily and purposely and not because of some mistake or inadvertence or carlessness or other innocent reason. More precisely what is meant by wilfully in the eyes of the law, means doing an act purposely with bad intent. It means having the purpose to cheat or do a wrong. It means with specific intent to disregard the law or do that which the law forbid. It regards conscious wrongdoing.

On the other hand, wilfully does not mean inadvertence, carelessness or honest misunderstanding of what the law requires.

And so carlessness, and so forth, is not the equivalent of wilfulness.

Wilfulness involves the state of the person's mind, and that is an issue of fact as much as the state of his digestion. It is an issue of fact which you must decide.

Medical science has not devised an instrument which can record what was going on in a person's mind in the distant past or what motivated that person. The state of a person's mind may be inferred from words, from his actions, from his conduct. It has often been said you bring into the jury box with you your common

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sense and the experience of your daily lives in the market place, in your home, in dealing with all kinds of people. That is what makes a jury such a tremendous force for the administration of justice.

What a pity it is if not an annoyance to come in contact with people whose intellectual achievement is restricted to a knowledge of what some books contain. Laden down with acknowledgment of honors at the academy they haven't got common sense, they have no knowledge of human behavior; you can pull the wool over their eyes, just like taking candy from a baby. They don't belong in a jury box. We want people who have lived, who have seen the bitter and the sweet, who can judge human behavior by actions as well as by words, persons who have rubbed elbows with all kinds of people, the mighty and the small, and of learned that courage can be found with the most ignorant person and found lacking in those who boast of their degrees.

And so you apply that knowledge that has come to you thatmakes you ministers of justice. All that knowledge, that is the reason that you are so powerful. We want that as well as understanding of the law, your knowledge of human behavior. You undoubtedly agree with the great philosopher that books are a bloodless

substitute for real life, and spare me from those who have nothing more to offer than book knowledge. It is obviously impossible to ascertain or prove directly what was the operation of the mind or the intention of any defendant. But a wise and intelligent consideration of all the facts and circumstances shwon by the evidence and exhibits, the entire trial record in this case, will enable you to come to a conclusion with a reasonable degree of accuracy what were the defendants intentions.

Intent involves a mental attitude with a knowledge of a defendant act, and with a knowledge of surrounding circumstances. You may draw a defendant and logical conclusion. In your every day affairs you are continuously called upon to decide from the acts or actions of others what their intentions are. Experience has taught us that actions speak more clearly than spoken or written words.

You must rely in part on circumstantial evidence in determining the guilt or innocence of a defendant or of each defendant in this case. Proof of the circumstances surrounding a man's actions can supply an adequate basis for a finding that a defendant acted knowing and wilfully. The actions of a man must be set in their time and place, just as the meaning of a word is understood only in its relation to other words in a

sentence, so the meaning of the particular act may depend on the circumstnaces surrounding it.

Now let me come to another subject, and that is similar acts. Remember we have received evidence on that subject. I want to be mighty sure that that is perfectly clear, too. It deals with the defendant relating to prior similar acts by some of the defendants which occurred prior to the conspiracy alleged in the indictment.

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatever that a similar act was done at another time or on another occasion. That is to say evidence that a defendant committed an act of a like nature may not be considered by the jury in determining whether the accused committed any act charged in the indictment.

Then how may it be considered, this evidence dealing with prior similar acts? As I told you at the time, and tell you again, the jury may consider that evidence dealing with alleged acts of a like nature solely, solely, solely, in determining the background and development of the very conspiracy embraced within the indictment before you.

Such evidence relating to prior similar acts may not be considered by the jury for any other purpose

whatsoever.

I emphasize, the jury is not to infer that the defendants had a criminal propoensity or bad character because of that kind of evidence that was received.

Now a few words about what the law means by direct and circumstantial evidence.

I believe in giving examples. I believe in translating and making meaingful the heavy language of the law, and I will do it here again.

I am looking at you. That is direct proof. I see you with my eyes. Suppose I asked the clerk, is the jury here? And he says yes. I don't see you when he tells me that. That is circumstantial evidence that this very same jury is here.

After all, I don't call your names off every single time and look at every single one of you. That is circumstantial evidence that you are here, even though I don't look at you.

Suppose I gave you this language and didn't give you examples. Would you understand it? Generally, the proof offered is of objective facts and circumstances from which one in terms of common experience can rationally and logically include the ultimate fact. But with that

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example it comes home, doesn't it? I hope. Do you get it? Do you get it? Does anybody fail to get it?

Here is a common example used by judges over and over again.

You came in today. The good Lord was kind and gave us a shining sun, and youare here. And suddenly somebody comes into the room and he is dropping wet, and he sits down and a veritable puddle forms at his feet. You didn't see the rain. That is circumstantial evidence that is has been raining.

If you looked at the rain with your own eyes that would be direct evidence, and that is all thereis to it.

It is rare that there is directevidence on this. Knowledge is generally shown by circumstantial evidence. And so direct evidence is testimony as to what a witness saw, heard, or observed, what he knows of his own knowledge. Circumstantial evidence, on the other hand, rests on an inference. Proof is given of facts, like the umbrella, wet clothing, and one infers therefrom what reasonably follows in the common experience of mankind.

I point out to you that circumstantial evidence, if believed, is of no less value than direct evidence.

There is absolutely no requirement that proof of a crime and a defendant's guilt be by either or both

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types of evidence. The only requirement is that the proof, circumstantial or direct, or all of one or all of the other, be beyond a reasonable doubt.

Now we come to accomplice testimony. Perna, Verzino. What's an accomplice in the eyes of the law? I am sure you know it. An accomplice is any person who participates in the commission of an alleged offense.

The accomplice, an associate in performing a crime has the purpose of either promoting, facilitating, incurring or aiding another in committing a particular crime. The fact a number of government witnesses are accomplices or have criminal records is to be carefully considered by you as bearing upon their credibility.

It is to be expected that the participants in an enterprise so unholy and so illegal will not be upright gentlemen.

Nevertheless, that doesn't say that you can settle for less than what the law demands. You must realize, I am sure, that in the prosecution of a trial the government is frequently called upon to use witnesses who are accomplices. Often it has no choice. This is particularly so in case of conspiracy. Frequently it happens that only the members of the conspiracy and he or their accomplices have evidence which is relevant to

and important to the case.

However, it does not follow, because a person has acknowledged participation in a crime, or is an accomplice or has a criminal record, that he is not capable of giving a truthful version of what occurred. That is for you to decide.

As with courage, so it is with truthfulness. It frequently comes from the mostly unlikely sources. Those from whom we rightfully expect the truth very often we find it not forthcoming, and those from whom we would hardly expect it, from them sometimes a veritable avalanche of convincing disclosure gushes forth.

The testimony of such persons, however, should be viewed with caution, must be scrutinized with the utmost circumspection.

The fact that Mr. Amorosa is convinced, the fact that counsel for the defense are not convinced -- in fact, they denounce it with every bit of energy they can bring in back of their words -- is of no concern to me or to you. It is what you think, you the jury. But you must be cautious when it comes to relying on the testimony of a wicked person who is an accomplice. What I am emphasizing is that that particular element or elements does not automatically nullify them, but you have to decide

that issue, and so you will consider whether the testimony was inspired by self-interest, personal advantage, hostility, or whatever other human factors may be involved. You should consider whether the testimony of such a witness was a fabrication induced by a promise or even a belief that they will receive favorable consideration in their respective cases.

There is no requirement in the federal court that the testimony of an accomplice be corroborated. Conviction may rest on the uncorroborated testimony of an accomplice, if you believe it and find it credible.

To acquit a defendant you need not find that any witness against him has lied. The test always is "are you satisfied beyond a reasonable doubt from the entire record in accordance with the Court's instructions of the guilt beyond a reasonable doubt of each of these defendants on trial?

So if you find the testimony of any of these accomplices was deliberately untruthful, reject it. If upon a cautious and careful examination you are satisfied that the witnesses have given a truthful version, and the government has sustained its burden of proof beyond a reasonable doubt, in all other respects as outlined in my instructions, then you have sufficient proof on which to bring a

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verdict of guilty. Otherwise, the defendants are entitled to an acquittal.

Evidence that a person has been convicted in the past of certain crimes may be considered by you in determining the witness' credibility by which is meant his worthiness of belief.

As you contemplate the testimony before you of a confessed perjurer, of a confessed accomplice, I would suggest you might consider whether he presented an instance of purge or perjury.

Doesthe witness purge himself? Has he for the moment pushed aside all the rot in the make-up? That is possible. Or is this a Machiavellian approach for a very personal reason. You have no concern with the government's estimate and no concern with the estimate by counsel for the defense. I venture none. I just suggest to you guides for the weighing of testimony.

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The government contends that there is aside from that kind of testimony from these accomplices, Perna and Verzino, other proof which you may regard as a reliable character in support of the indictment. Its veracity or believability is an issue that can be resolved by the jury.

I would say to you, your greatest challenge is your evaluation of the testimony as it came from the lips of witnesses and your estimate of the exhibits and the stipulations.

It is your estimate of the testimony given by the witnesses, and each of them, that is controlling. Quality of proof is really the test. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. In weighing the effect of such a discrepancy, consider whether it pertains to a matter of importance or to an unimportant detail, and whether the discrepancy results from innocent error or from wilful falsehood.

If you find that any witness has wilfully testified falsely as to any material fact, you may reject all the testimony of that witness, or you may accept such portion or part which commends itself to your belief.

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In sizing them up in your search for the truth, you should be guided by your plain, every day common sense. You saw each witness, you observed the manner of his giving testimony. Out of the welter of testimony you are called upon to determine the factual issues in the case. Thus, upon all the evidence, you, the jury, are to resolve the conflict.

To acquit a defendant, ladies and gentlemen, you need not find, I repeat, that any witness against him has lied. The test always is, are you satisfied beyond a reasonable from the entire record, in accordance with the Court's instructions, of the guilt beyond a reasonable doubt of the defendant on trial.

If upon a cautious and careful examination you are satisfied that the witnesses have given a truthful version and the government has sustained its burden of proof beyond a reasonable doubt in all of the respects as outlined in my instructions, then you have sufficient proof on which to bring in a verdict of guilty. Otherwise, the defendants are entitled to an acquittal.

Ask yourselves, "How does his testimony," referring to every witness, "impress me?" What degree of credit you should give the witness' testimony should be determined by his conduct, his manner of testifying, his relation

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to the controversy, his bias or impartiality, and the reasonableness of his statements. Is the witness interested in the outcome of the case? Is there a motive to testify falsely? Was the witness mistaken? Was he correct?

In other words, whatyou try to do, to use the vernacular, is to size up a person, just as you would in any important matter when you are undertaking to determine whether or not a person is truthful, candid and straightforward.

A witness may be discredited or impeached by contradictory evidence that at some other time he has said or done something or failed to do or say something which is inconsistent with his present testimony. The testimony of any witness whose self-interest is regarded convincing to you is to be considered with great caution and weighed with great care. You should consider the witness' intelligence, motive, state of mind and demeanor while on the stand. You should consider his candor, or lack of candor, his possible bias, his means of information, and the accuracy of his recollection. If you believe that any witness has been impeached and thus discredited, it is your exclusive province to give that witness' testimony such credibility as you think it deserves. Your determination of the

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credibility of a witness very largely depends upon the impression he made upon you and the conviction with which he testified, the way he testified. Did it come over to you? Did it impress you? Did it touch you? Did it affect you? That is for you to consider, not how that witness impresses any of the rest of us.

The fact that a witness is an official or an employee of the government does not mean by itself that you should give greater or special credit to his testimony. The testimony of any such witness should be weighed and scrutinized in the same manner as any other witness who has testified in this case. You judge their testimony in the same way, taking into account interest or any factor which may have influenced them to color orfabricate their testimony.

Examine with care for the clean or impure motive that prompts the testimony of a witness. Ask yourselves after each witness, "What was the witness' motive? Did the witness commit perjury in order to get the defendants convicted? Orwas his testimony induced by an unflinching desire to tell the truth. Ask yourselves whether the testimony was adduced because of dislike of a defendant or revenge, or for any other impure motive. Does the trial record point to a wrongful reason which would

prompt the testimony? Or do you believe that a witness testified as he knew the facts to be and scrupulously observed his oath? All of this is for you to evaluate.

So, you see, a study of the motive for testimony may be a strong indicator, if not a conclusive one, as to where truth lies and falsity exists.

Several prosecution witnesses signed agreements with the government wherein they agreed to do various things in exchange for certain consideration from the government. Specifically, in those agreements they agreed to testify truthfully, in good faith, and to reveal in full their total involvement and all their associates in the crimes charged. These agreements are not any evidence whatsoever that those witnesses have, in fact, told the truth, or testified in good faith, or have revealed their total involvement in the crimes.

Whether or not the witnesses have testified truthfully, fully and in good faith from the witness stand in this case is a question of fact which only you, the triers of the fact, can decide.

You have seen very clearly that six of the defendants did not take the stand. What has the law to say? There have been some words as to why. Disregard all that. I allowed it because there was no particular

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objection at the time. But we are not concerned with whether or not or what induced or what prompted a defendant not to take the stand. Look at the law, just be guided by the law. A defendant has an absolute right to remain silent. He has an absolute constitutional right to sit throughout the trial from start to finish without uttering a word or presenting a word or a syllable of evidence in his behalf; he has a right to demand that the charge be proved beyond a reasonable doubt without his participation. No defendant in a criminal case is required to testify.

These are propositions of law, and I hope I have convinced you how meaningful they are to a Judge. Whether they favor a defendant or favor the government, that is the law. These propositions of law are bigger than you and bigger than counsel and bigger than all the people in this room, including the Judge. On their preservation depends our destiny. If you don't think that keen observers of the scene in America think that the day is not too far off when there will be an invasion of the holy ground on which justice predicates and holds firm, as with hoops of steel, these principles of law, you are mistaken.

So if you as much as have a shadow cross your mind against any defendant because of his failure to testify, you yourself would violate your oath. You cannot

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disregard these instructions or any of them. And so I repeat to you that a defendant in a criminal case does not have to testify, and the fact that he does not testify or even if he called no witnesses whatsoever cannot be held against him in any respect.

If you will remember what I told you earlier, you will see how this naturally follows. Since the burden of proof rests upon the government and never shifts, a defendant need not take the stand or call witnesses. It still remains the burden of the government to prove the guilt of the defendant beyond a reasonable doubt. And so I repeat, in no respect might the fact that a defendant has not testified enter into your deliberations, nor may you draw any adverse inference against him by reason thereof.

All of life is a sort of game, and in the game you have certain values to each piece. The presumption of innocence is a big piece in favor of a defendant. The presumption that I have just announced is also a piece in the game of life, and a clean game, not a crooked game, and you give those factors their appropriate value. But that does not prevent the government, if you think the government has done so, from adducing proof which nevertheless may satisfy you beyond a reasonable doubt as to

the guilt of the defendant.

What about a defendant who did testify? Two of them took the stand. What has the law got to say as to them? As to DeLutro and Gwynn?

The law permits, but does not require, a defendant to testify in his own behalf. The testimony of DeLutro and Gwynn is before you. You and only you can determine how much credibility or believability their testimony is entitled to or how little.

However, I instruct you that it is the law that interest creates a motive to give false testimony, that the greater the interest the stronger is the temptation, and that the interest of a defendant in the result of a trial is of a character possesed by no other witness and is, therefore, a matter which may affect the credence which shall be given to his testimony.

However, let me point out that the fact that the defendants DeLutro and Gwynn have such an interest in the case does not mean that they will testify falsely. It is for you, the jury, to decide whether they testified truthfully and how much weight to give to their testimony.

Now a few words as to inconsistencies -- and I am not far from completing this charge.

Where a witness has been impeached on the basis

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of a prior inconsistency, or inconsistent statement, he may always endeavor to explain away the effects of the supposed inconsistencies by relating whatever circumstance or circumstances would remove it.

Thus, fear of consequences of plain speaking, such as personal safety of one's self is such a circumstance and may be considered by the jury in evaluating the reasons for the inconsistency.

An expert was called to the stand, a handwriting expert. He offered testimony under oath. A word or two as to the law with regard to such a one.

Witnesses who by education and experience have become expert in some art, science, profession, or calling may state an opinion as to relevant and material matter in which they profess to be expert, and may also state reasons for the opinion. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves.

If you decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

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Now a few words as to a prior conviction. The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment of a witness.

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Now a few words as to the use of informants. There has been testimony with respect to the use of persons sometimes referred to as informants or informers. These services are availed of by government agents at times to obtain introductions to persons suspected of violating the law. There are certain types of crime where, without the use of informants, detection would be extremely difficult. Frequently, it is necessary to get leads for introductions to persons allegedly engaged in illegal activities or otherwise to aid enforcement officers. The law from time immemorial has permitted the use of informers, provided the rights of a defendant are not violated. Whether or not you approve the use of an informant in an effort to detect law violation is not

to enter into your deliberations. I will tell you -- I don't mind including this -- that the representatives of the government to use informants sometimes take their lives into their hands. It takes courage to deal so often with these despicable characters in order to know where the fire is going on and where the rot exists and where the cash or the secret hiding places can be found. You are not going to go look for it; someone has to. The question is, what was done here in this case? Was it done with that kind of high motive or was it not? Was there pollution that runs amuck here, or is it confined? Or is there any, really, when you come to add up all the evidence?

There is no presumption against the government from its failure to call a witness when it appears that his testimony would be merely cumulative or repetitious and of no greater value than that of witnesses who have, in fact, testified.

Whenever a person is equally available to both sides to testify, that is, when he can be subpoenaed to testify by either the defense or the government, and neither side calls him as a witness, you are not permitted to draw any inferences against either the defense or the government for their failure to call that person as a witness.

You may not draw any inference, favorable or unfavorable, towards the government or the defendants on trial from the fact that certain persons were not named as defendants or, having been named, are not on trial before you now. Those matters are wholly outside your concern and have no bearing on your function as jurors.

Now I bring the charge to a conclusion. Ladies and gentlemen of the jury, when will you lay down as law the letter, the spirit of the law, that a defendant is presumed to be innocent until the government fulfills its obligation proving him guilty beyond a reasonable doubt, and all those other propositions of law that I havetried to emphasize and to delineate for you, each one equally sacred, we must not lose sight of the rights of the other party in this litigation, the plaintiff, the government. We must bear in mind, and I so charge you, an equally vital concept of justice, defined in classic fashion by the Supreme Court of the United States, and hence the law of the land, ... justice though due to the accused, is due to the accuser also.

If you find the law has not been violated, you should not hesitate for any reason to return a verdict of not guilty. That wouldbe your sworn obligation. But, on the other hand, if you should find that the law has

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been violated as charged, you should not hesitate because of sympathy or any other reason to render a verdict of guilty because in your concept of what is required here that would be the justice of the case, if you so decide. And if that is your decision, it will also constitute a clear warning that a crime of this character may not be committed with impunity. The public is entitled to be assured of this.

All of these things that I have mentioned follow only if, as and when you are satisfied beyond a reasonable doubt as to each of the elements which I told you the law makes imperative in order to sustain each of the counts set forth in the indictment.

Under your oath as jurors you cannot and must not allow a consideration of the punishment which may be inflicted upon a defendant if he is convicted to influence your verdict in any way. If you did that, you would clearly violate your own oath. That duty rests exclusively with the Judge, who, upon the basis of a full official report dealing with the defendant's general life pattern of behavior, imposes sentence.

The indictment names these eight defendants. In determining the guilt or innocence of each of these eight defendants, you must bear in mind that guilt is

personal. Indeed, I told you that, and I want to say it over and over and over again. You got to look at the evidence as it relates to Magnano, you got to look at the evidence as it relates to Pallatta, you have to look at the evidence as it relates to each one, add it all up, all the evidence. You don't take one piece of evidence and say, "Does that satisfy me beyond a reasonable doubt?" Of course not. It has a value. How much weight do you give it? None at all? A little bit? A whole lot? You take this piece and that piece and that piece. Ask yourselves when you add it all up as to a particular defendant, is he guilty or is he not guilty. Then you go to the next one and the next one. You apply the same test.

Once in a great while I get a note from a juror because I did not make it clear, and everyone does not speak up, does not say, "You know, I am really not that well informed." Who does that? How unusual is it for a person to confess his limitations. The guise under which so many people operated. Then when they get called to account, they flop on their faces. Up to that moment they have gotten away with it -- silence, gesture, a knowing look. And then all of a sudden they reveal their true selves, empty, low, contemptible. And there is

great revulsion that ensues.

Remember that guilt is personal. The guilt or innocence of each defendant on trial before you must be determined separately with respect to him, solely on the evidence presented against him, or the lack of evidence.

I repeat, the indictment is in 17 counts, but you are to consider only 13. Each count charges a separate crime. There are facts and elements common to more than one count. But you must consider each count separately as to each defendant and return a separate verdict of guilty or not guilty for each count and each defendant in the indictment.

The verdict, whether for acquittal or for conviction, must be unanimous. Each juror is entitled to his own opinion. You should, however, exchange views with your fellow jurors. That is the very purpose of jury deliberation, 12 jurors, not one, not three, not five, 12.

You have a right to your opinion, but you must discuss it with one another; you must give each the benefit of your views.

And so the law says that you must listen to the arguments of your fellow jurors, you must consult with one another, you must reach an agreement based solely and

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wholly on the evidence, if you can do so without violence to your own individual judgment, and to employ that high degree of genuine courage you justifiably expect, especially in these perilous times, from your public officials.

You should not hesitate to change an opinion, which upon a consideration of all the evidence with your fellow jurors, appears erroneous. However, if after carefully considering all the evidence and the arguments of your fellow jurors you entertain a conscientious view that differs from others, you are not to yield your convictions simply because you are outnumbered or outweighed.

The exhibits and a copy of the indictment will be sent to you promptly.

If, to help you in your deliberations, you wish a point or points in the testimony read, please specify exactly as possible just what point you wish the official reporter to locate, and it will be read to you, no matter how much time it takes.

Your oath, ladies and gentlemen of the jury, sums up your duty, and that is without fear or favor to any man you will well and truly try the issues between these defendants and the United States of America according to the evidence given to you in open court and the laws of the United States, and that is what you swore to do.

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I have every confidence that you will fulfil your sworn obligation as American ministers of justice to render a true verdict based solely and exclusively on the facts and on the law in this case.

If the government has carried its burden in accordance with the evidence and the law as to the defendants, you must not flinch from your sworn duty, you must convict. But if it has failed to carry its burden as to a defendant, your sworn duty is to acquit. And this I say to you with measured tones: You have undoubtedly talked about justice in your homes and in your daily affairs, in your comings and your goings, as is your inalienable right. The point is that now each of you sits in the seat of justice. How will you do? Apply your criticism to yourselves. Will you call them as you see them? Will you do justice as between the government on the one side and the defendants on the other solely on the facts and on the law? This Judge has every confidence that you will do exactly that.

Marshal, will you take the jury to the jury room.

(Jury excused.)

THE COURT: Are there any exceptions or requests by the government?

MR. AMOROSA: No, sir.

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THE COURT: Are there any exceptions or requests on behalf of any defendant?

MR. GOLDBERG: Your Honor, I rise on behalf of the defendant Pallatta with regard to your charge on reasonable doubt. The defendant Pallatta excepts to your failure to charge in the negative, that a reasonable doubt is such a doubt as would cause the jury to hesitate to act in matters of importance in their own lives.

THE COURT: The exception is noted. The Court will stand on the charge as given.

Any other exceptions or requests?

MR. EPSTEIN: On behalf of the defendant Bolella, the defendant Bolella takes exception to the Court's Pinkerton instruction, the instruction to the jury that before it can convict a defendant of any of the substantive acts which are in the indictment, they must find he was a member of the conspiracy at the time the substantive act was committed. Your Honor has instructed the jury if they find one a member of the conspiracy, that individual is bound by the acts and declarations of the conspirators prior to the time of his joining and after the time of his joining. I submit that charge is erroneous under Pinkerton.

Your Honor, I also object to the Court's charge on

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prior similar acts, as set forth in the record by me earlier. The introduction into this case --

THE COURT: You have already elaborated on that, and I know whatyou refer to. Tell me what else you have?

MR. EPSTEIN: May I have a moment, your Honor?

Your Honor, the only additional exception to the Court's charge, your Honor charged the jury that in considering the substantive counts they could find that someone was guilty if he were in actual or constructive possession of the contraband as set forth in the substantive counts. Your Honor, I submit under the statutes which are involved, the proper charge to the jury is on aiding and abetting.

THE COURT: Very well. Exception is noted.

MRS. OBERMAN: Your Honor, most respectfully on behalf of the defendant DeLutro we except to your Honor's charge as to the second element of the conspiracy, that whether a defendant is a member of a conspiracy is a fact to be drawn from all the evidence in the case, and again, your Honor's statement that the only way of determining if the defendant entered into a conspiracy is to take into account all the facts and all the evidence in the case. We submit that the proper statement of the law is contained in DeLutro's request 14, that as to this element the defendant's own actions and own conduct and own state-

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ments must be considered.

THE COURT: Very well.

MS. OBERMAN: I have other matters.

THE COURT: Go ahead.

MS. OBERMAN: Your Honor, we also object to your Honor's charge that when the government throws out the net and that an occasional minnow may well go free, in the context of this case, your Honor, most respectfully it could convey an impression of big fish versus little fish, and that, I think, was the ground for a motion for the severance.

THE COURT: I get your point. What else?

MS. OBERMAN: On the example as to circumstancial evidence --

THE COURT: You take exception to what I said about circumstantial evidence. What else?

MS. OBERMAN: Your Honor, you charge that a defendant who testifies in his own behalf may have a motive to give false testimony and that the interest of the defendant is like that possessed by no other witness.

THE COURT: That is the law.

MS. OBERMAN: Most respectfully, your Honor, we believe --

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THE COURT: You take exception?

MS. OBERMAN: Yes.

THE COURT: That is it.

MS. OBERMAN: And especially, your Honor, in light of the instruction given as to the accomplice testimony, that when you weigh one against the other, the defendant comes off much the poorer, although the accomplice has an equal motive to falsify.

THE COURT: Very well.

MS. OBERMAN: And we adopt also, of course, the objections heretofore noted.

THE COURT: Anything else?

MR. BLOSSNER: Your Honor, the defendant Soldano respectfully requests as to the model instructions as to the identification testimony and as to photographic identification, which I believe --

THE COURT: You take exception to that?

MR. BLOSSNER: Yes.

MR. HOFFMAN: Respectfully, your Honor, on behalf of Mr. Lucas I except to the following --

THE COURT: Please don't make elaborate speeches on this. Just mention the point, because it is now 7:30, and I would like to have the jury on their way. I don't want to cut anybody short. I don't want any expansion of

a thought that I immediately get.

MR. HOFFMAN: I join in the previous exceptions.

I except to the charge concerning defendants not taking the stand.

I except to the charge with regard to the statement that the public is entitled to be assured that crimes of this character cannot be committed with impunity.

I except to your Honor's statement of the fact that when Mr. Lucas' house was searched, or words to that effect, he was found with $585,000 and drugs were found in possession of Mr. Lucas. Specifically there is no basis for that; there is no evidence of any drugs found in Mr. Lucas' house or his possession.

THE COURT: Wait a minute? Did I say drugs were found there?

MR. AMOROSA: I have no recollection of your saying drugs, but Mr. Virella has some recollection of your saying drugs. I thought you said money.

THE COURT: I said money and the envelopes, the bags and the machine, sealing machine. I will tell the jury if I said anything about drugs being in Mr. Lucas' possession, that there were none. I will straighten it out now.

MR. HOFFMAN: I would respectfully request

a reasonable doubt?

MR. AMOROSA: Yes, sir, that is certainly the case.

THE COURT: What is it thatyou want? Is there any portion of the request that you want me to give?

MR.AMOROSA: Yes.

THE COURT: What is it?

MR. AMOROSA: Does your Honor have the request before ...?

THE COURT: Just read it to me, sir.

MR. AMOROSA: Identification testimony is an expression of belief or impression by the witness. It's value depends on the opportunity on the opportunity of the witness to observe the offender at the time of the offense and to make a reliable identification later.

We believe that that should be told to the jury.

THE COURT: Very well, I will so charge.

What else is there?

MR. AMOROSA: That, in substance, need all be said in our opinion.

THE COURT: Bring in the jury, marshal, please.

(Jury in box.)

THE COURT: Ladies and gentlemen of the jury: There are one or two things I would like to add. It has been called to my attention that through inadvertence

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that in straightening it out that you merely say if you stated there were any drugs found there, that was a misstatement.

THE COURT: I want to tell them exactly what I understand to be the evidence, and I intend to straighten it out. I don't believe in playing around with a jury.

MR.HOFFMAN: I respectfully except.

THE COURT: What is it now, Mr. Epstein?

MR.EPSTEIN: Forgive me. I overlooked one exception. I take exception to your Honor's accomplice charge, to your Honor's instruction to the jury on how to treat accomplice testimony. Your Honor should have instructed them as in United States v. Padgent, as set forth in my original request.

THE COURT: Is there anybody else who has an exception or a request?

MR. AMOROSA: Judge, I think on behalf of the government something should be said to the jury with respect to the identification of the defendant Soldano. I don't believe that your Honor said anything with respect to his identification procedure in this case.

THE COURT: I don't see that that particular item requires any degree of proof greater than any other factual matter. Do you think it has to be established beyond

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I refer to drugs being found on the premises with the $585,000, at the home of Mr. Lucas. I was wrong if I said so. I certainly did not intend to. What I undoubtedly wanted to say was, No. 1, $585,000 in cash; No. 2, the material used for those bags, whatever you call that material. You remember it was shown you. I have forgotten the name of that kind of material. I know you know what I am talking about. And that can of lactose. And then, finally, that sealing machine, all of which was introduced in evidence. And so please put that in the place of what I said.

You remember that Mr. Blossner on behalf of the defendant Soldano argued that the beginning and throughout the trial, and certainly during summation, on the issue relative to identification of his client. You remember that he introduced into evidence that book of pictures, and I neglected, or if I didn't neglect, I want to rectify the omission of the following words with regard to that particular defendant:

Identification testimony is an expression of belief or impression by the witness. Its value depends on the opportunity the witness had to observe the offender at the time of the events and to make a reliable identification later.

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Is that what the government consents to?

MR. AMOROSA: Yes, sir.

THE COURT: Very well.

Now, ladies and gentlemen, the marshal will take you to dinner. Take your time. I would like all of you, the 16 of you, to go to dinner, and t[illegible] return here.

And the mome[illegible]t they return, Marshal, the 12 jurors are to go into the jury room to enter upon their deliberations. Then the alternates will be excused.

You understand what I am saying. I ask you to be good enough as alternates to go along with the jury, not talk about the case during dinner, and return. Why does the Judge say that? Well, these are practical things. They happen once in a while. Suppose one of the jurors, God forbid, does not feel well. He comes back and is unable to carry on before the jury enters upon its deliberations. I would like to relieve that juror and have one of the alternates take over. That is a very selfish reason, but a very necessary one. I know of no other reason, other than the pleasure of having you with us as long as possible. That will permit me to impose upon you. And so, will you please do that, unless there is some great disadvantage, and I take it there is none. I asked the clerk to find that out, and he

assured me that all is well on that score. I may not see the alternates when they return. I do not want to get off the bench without saying a word to each of you. These things are meaingful to me. I know other people take these things in stride, they take out of a human being all they can exact; they can't duplicate, they don't have what it takes to duplicate it; they think it is a lot of nonsense, a waste of time they have not got the capacity to do it, and they just dislike everybody who does.

But may I say to you with all the sincerity that I can summon, that I am indebted to you for the inspiration that came to me as a Judge to see how each of you clung to each word and showed the spirit of caring. You really care about what it is that brings us together, and that notion or that caring is a great cement that holds all these parts together. It is really the basis of all religions. And so you go with the thanks of the Court. Your contribution is enormous; it typifies what each of you has demonstrated. Thank you.

We will announce a recess.

(The jury retired to go to dinner at 7:30 p.m.)

(The jury returned to the jury room at 9:00 p.m., at which time the alternate jurors were excused, and the jury commenced its deliberations.)

Counts 11, 12 qnd 13, which counts refer to defendants who have been severed. A copy of the indictment should go to the jury, and as to the counts which are not before the jury, there is no reason for those counts to go to the jury.

THE COURT: It is an unnecessary burden. No. 1, you got to delete them; No. 2, I can't see how that can be prejudicial one way or the other, the fact that there are three other counts. There are a lot of people mentioned here who are not accounted for in any way so far as the jury is concerned. Of the whole group only eight are on trial, and I have already read substantial parts of it. I can't see that is enough of an objection. I am going to rule the whole indictment goes in. They have the overt acts and everything else.

MR. J. PANZER: May we just cross out those counts that are not to be considered by them, because they may become confused.

THE COURT: Don't worry about that. If I thought there would be any prejudice, I would go along with you. But I have been rattling off names that are unknown to them that were mentioned from time to time, names of those who are not on trial right now; and I can't see that adding the same recital with regard to three other counts

(The following took place at 9:50 p.m.:)

THE COURT: It is now 10 to 10. About 9:35 I received the following note from the jury:

"Judge Cooper:

"The jury would like the following:

"1. Copies of the indictment.

"2. Copies of charges.

"3. Pads and pencils.

"Thank you.

"Sheila Simon, Forelady."

The clerk tells me that item 3, pads and pencils, have already been sent in, and there seems to be some dispute as to the indictment.

Now, what is wrong about sending in the indictment? What is the government's position?

MR. AMOROSA: We think the entire indictment as it stands now can be sent in. In my opening remarks I referred to these other counts.

THE COURT: I did, too, in my charge. I had to read them in order to tell them exactly what was charged with regard to the conspiracy.

What is the defendants' position?

MR. EPSTEIN: Most respectfully, when your Honor read the substantive counts, your Honor omitted

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makes any difference at all. There is no prejudice there. Send it in.

They say copies of charges. What I think they mean are the overt acts. I would send that in, rather than read them. Let us get that resolved.

Marshal, ask the jury -- and I will wait for your answer -- when they say "copies of charges" do they mean the overt acts that I referred to when I charged them? Ask them if they mean a copy of the overt acts that I referred to in the course of my charge, will you, please?

MR. AMOROSA: Judge, with respect to the exhibits, there are many exhibits which your Honor ruled were admitted only to a limited extent, for instance, the Perna agreement, the Vasquez agreement, the Verzino agreement, where we had to delete certain paragraphs because of your Honor's rulings. Because of this, and not only with respect to just those three, Judge, the government is going to suggest that we not send any exhibits to the jury --

THE COURT: I am sorry. All the exhibits go in. If you have to go through some of them, if some have to be retyped, that is just too bad. If you want to cover up certain parts, that is okay with me. The parts that didn't go in, take care of. But don't tell me the jury

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should not see the actual exhibits because it is an inconvenience. That is out.

MR. AMOROSA: Can we, therefore, send some in now?

THE COURT: Certainly, and have the clerk take in the others.

Mr. Bowen, you go right about taking them in.

What the jury is entitled to, I am going to see that they get.

Now, what do you say, marshal?

THE MARSHAL: Your Honor, they want the counts in the indictment plus the overt acts.

THE COURT: Give the marshal a clean copy of the indictment. That will take care of their message.

MR. J. PANZER: Does that include the exhibits of the defendants?

THE COURT: I am just sending the indictment in now. I am ruling that all the exhibits are to go into the jury room, and I want you to recite for the record what you are sending in to the jury. You are going to be held accountable for your recital on the record.

No. 2, if there is any exhibit or exhibits which cannot go into the jury room in their entirety, because we ruled that certain portions are not in evidence,

then I want those immediately attended to so they can be sent in within a matter of minutes.

Now, you tell me which ones are being sent in and give them to the clerk to send in. That is all there is to it.

MR. AMOROSA: Does your Honor want me to read into the record the ones I am going to send in?

THE COURT: That is a common thing you do every time. Have the record reveal what it is the government is sending in to the jury. And the defense will read into the record what they are sending in.

THE MARSHAL: The jury wants to know if they can have copies of the indictment.

THE COURT: No, just the one.

Get your exhibits together. I will step off the bench for a minute. The jury wants them right now. They are the bosses right now and they get what they want.

(Recess.)

THE COURT: Call off the exhibits.

MR. AMOROSA: The following government exhibits in evidence: 1, 1-A, 2, 2-A, 2-B, 3, 3-A, 3-B, 4-A through 4-C, 6, 6-A, 6-B, 7, 7-A, Government's Exhibit 8, with the exception of paragraphs 1, 7 and 8, which will be taken out by your clerk, 9, 9-A, 10-A through 10-K -- 11 will not be

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submitted to the jury, as it is heroin --

THE COURT: I already told him the heroin and the money would be available if they insisted on it. That is it.

MR. AMOROSA: Did you say the heroin would be available for the jury?

THE COURT: If they wanted to see it, sure. It is an exhibit; you will have to produce it. They have not asked for [redacted] why do you make an argument about it?

MR. AMOROSA: Government's Exhibits 32, 33, 33-A, 33-B, 35, 35-A, 36, 36-A, 3503-F with the exception of the first, the sixth and the seventh paragraphs, 37, 37-A, 38, 38-A, 39-A through C, 40, 41, 42, 42-A, 43-A through E, 45, 46, 77, a tape of the Perna conversation with Condella, your Honor, which is here, and the jury would not be able to make use of it, unless it was on the recorder.

THE COURT: Do you have a transcript?

MR. AMOROSA: There is a transcript which was just admitted as an aid to the jury.

THE COURT: So there is no harm in that, is there? Why can't that go in?

MR. AMOROSA: We have no objection.

THE COURT: Well, send in the tape and send in the

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transcript, and if they want the tape played, why, you just set up the machine. That is all. The jury is entitled to the exhibits. Don't quarrel with them. They want them; let them do what they want. If they want the heroin, deliver the heroin to them with 15 guards. They are entitled to pick it up and look at it. If they want the money, let them look at it. It is an exhibit.

MR. AMOROSA: Government's Exhibit 69 is the transcript of the conversation between Perna and Condella.

THE COURT: The chances are they won't want to be bothered with any of it. They have already been told the heroin and the money is in the vault, or wherever I said, and in all likelihood they would have no interest in sending for it. But you have to let the jury have whatever they are entitled to. They have to resolve the guilt or innocence of these people. They have to look at these exhibits, not at you and not at me.

MR. AMOROSA: Government's Exhibit 86, which is also Soldano's Exhibit C in evidence, Government's Exhibit 106, 107 and 108, 112 and 110.

THE COURT: Does the government represent now that it has mentioned each and every exhibit that was received in evidence on behalf of the government?

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MR. AMOROSA: Yes, we have, sir.

THE COURT: Very well. Turn it over to the marshal. Marshal, will you take it, please?

MR. AMOROSA: There are some additional defense exhibits.

THE COURT: In the meantime, we have already wasted too much time. They sent this note in almost three-quarters of an hour ago. In most cases the lawyers get together, they pile up the exhibits, and in ten minutes the whole business is in the jury's hands.

Let us get going. Give them to the marshal. Let him, at least, take that much in.

Mr. Edward Panzer, the Court designates you as the one to collect all the exhibits on behalf of the defense. Are you ready to do that or do you want a little more time?

MR. E. PANZER: I am ready. Magnano's Exhibit K, Magnano's Exhibit J, Magnano's Exhibit G, Pallatta's H, Pallatta's C, Pallatta's G, Pallatta's B; DeLutro's C, Soldano's D and Soldano's C. Those are all the defense exhibits.

THE COURT: Thank you. Do you represent, Mr. Edward Panzer, so far as you know those are all the exhibits on behalf of all the defendants?

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MR. E. PANZER: Yes.

THE COURT: Marshal, will you take those into the jury room, please. Turn them right over to the marshal, will you, Mr. Panzer?

That takes care of that.

Mr. Clerk, will you take the jury's note.

(Jury note marked Court's Exhibit 6 for identification.)

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(At 10:55 the jury took its place in the jury box.)

THE COURT: Madam Forelady and members of the jury. Application granted. You would like to adjourn at 11 p.m. and begin tomorrow at 10 a.m.. I was about to send for you when your note came. You have had a full day. Go home and have a good night's rest. Come back tomorrow morning at 10.

Always remember -- I have seen these things more than you; I have lived a long time and seen how people behave -- watch yourselves. The case is now in your hands. Someone might be tempted to talk to you, to telephone you, to bother you. You let me know immediately. I don't think there's a chance of it happening, but it has happened in the past. The law has a way of meeting. I hope I have shown you that the Judge is not afraid to act. If someone

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does something not proper, I will move right on in. That is the only thing I can say of myself. I have done it. I will continue to do it until my last days. Nobody is going to bother you. As I said, the chances of it happening are very small. I want you to know that you are to be on your guard. Don't let anybody bother you. Go right to your room in the morning. Nobody has a right in there, not even the marshal. He knows his place. When you want him, you knock on the door. He is not entitled to be in that room.; that is the inner sanctum; That is yours. I can't go in there; No one else can go in there where you preside. We understand each other. Thank you. Good night.

(Jury excused.)

MR. AMOROSA: Do we have your Honor's permission to retrieve the exhibits and bring them back tomorrow after the jury leaves?

THE COURT: You are absolutely right.

Marshal, go right in now, get all the exhibits and bring them back here in my presence.

THE MARSHAL: Yes, sir.

(The marshal complies.)

THE COURT: Thank you, Marshal. Look them over quickly and tell me whether you have got everything.

MR. AMOROSA: Yes, everything appears to be here,

your Honor.

MR. E. PANZER: Everything appears to be here.

THE COURT: Good night, gentlemen.

(Whereupon, an adjournment was taken to October 23, 1975, at 10 o'clock a.m.)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA	Before: HON. IRVIN BEN COOPER, D.J., and a Jury
vs.	
JOSEPH MAGNANO, a/k/a "Joe the Grind," FRANK PALLATTA, a/k/a "Bolot" and a/k/a "Nose," RICHARD BOLELLA, et al.,	75 CRIM. 687
Defendants.	

New York, OCT. 23,24, 1975

U.S. DISTRICT COURT
FILED
JAN 13 1976
S. D. OF N.Y.

VOL #6

STENOGRAPHER'S MINUTES

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UNITED STATES OF AMERICA

v. 75 Cr.687

JOSEPH MAGNANO, et al.

October 23, 1975
10 a.m.

- - -

(In open court - jury present.)

THE COURT: Good morning.

I'm glad to see the jury here, and I thank you for being here on time.

You may continue with your deliberations, but in sending you out we want you to be reminded that we are aware of the heavy burden that you now face, and that actually wait upon you. That goes for the lawyers, and that goes for the Judge. If there is anything we can do to facilitate matters or to help you you are not to hesitate to call upon us.

We are great respecters of those who have a burden and who convince us of their willingness to meet that burden, and we are humble before that type of spirit.

Now, when you returned the exhibits last night there was a note that I don't know whether you wanted me to see it or not, don't comment on it.

Mr. Clerk, hand it to the forelady, and do whatever you want about it.

Mr. Clerk, hand this to the forelady.

(Note handed to the forelady.)

THE COURT: I think that's it. Go with our blessings.

All rise. Jury excused.

(Jury excused.)

THE COURT: Mr. Blossner, I have your note in which you say "I have a conference scheduled before Judge Judd in the Eastern District at 2 p.m. May I attend and return upon telephone call, if necessary?"

The answer is yes, you certainly may go, but please remember to either have some other attorney cover for you or make it possible for you to be here on very short notice. If there is something that requires resolution and you have to be here, I don't want to have to hold up the works because you're in transit. You just have to make appropriate arrangements.

MR. BLOSSNER: Thank you.

THE COURT: I had those things when I was less fortunate than you, when I had my office in my hat. Somehow, I figured out how those things were to be done and I did it.

Mr. Goldberg, I have your note. Your apology is accepted.

MR. GOLDBERG: That pleases me a great deal,

your Honor.

May I put on the record that should I be called away the defendant Pallatta, on the record, subject to your Honor's approval, consents to have Mr. Epstein act for and in my place, even to the extent of taking the verdict?

THE COURT: Stand up, Mr. Pallatta.

(Defendant Pallatta rose.)

THE COURT: Did you hear what Mr. Goldberg just said?

DEFENDANT PALLATTA: Yes, sir.

THE COURT: Is that acceptable to you?

DEFENDANT PALLATTA: Yes, sir.

MR. E. PANZER: I make the same application on behalf of Magnano.

THE COURT: Mr. Magnano, did you understand what your lawyer just said?

DEFENDANT MAGNANO: Yes, sir.

THE COURT: He may not be here, he has other things, undoubtedly, he wants to attend to, but whatever it is he will not be here on all occasions and I understand you consent to have Mr. Goldberg or Mr. Epstein -- is that it?

MR. E. PANZER: Yes.

THE COURT: -- represent you in Mr. Panzer's

absence. Is that right? Do you understand what I said?

DEFENDANT MAGNANO: Yes, sir.

THE COURT: Is it all right with you?

DEFENDANT MAGNANO: Yes.

MR. AMOROSA: Judge, two matters.

One, with respect to the Caravella exhibits that are now in the jury room, and were of course submitted into evidence. I made an error last night when I was indicating which ones went into the jury and which ones were admitted in evidence. These are the Caravella exhibits which are in the jury room right now and which were admitted into evidence.

43A, D, E, F, G, J, K, and L.

THE COURT: Were they actually before the jury yesterday?

MR. AMOROSA: Yes, sir. They were in. I just made a mistake.

THE COURT: I want to get the difference between your error and what it really meant insofar as the actual exhibits are concerned.

You're saying to me that with the corrections made on the record those exhibits as corrected just now were actually physically exhibits that were turned over to the jury yesterday.

MR. AMOROSA: Yes, sir.

THE COURT: Very well.

MR. AMOROSA: One other matter.

After your Honor leaves, can we put on the record at this time all of the 3500 material that we turned over to the defense in the case?

THE COURT: Please. All I ask you to do is make a list, and make it an exhibit. That's the way you do it. Plus reading it into the record to double check it. You do it on your own time, when you have that list ready I give you permission right now to read it into the record whether I am here or not.

MR. AMOROSA: Thank you.

(In open court - jury present at 11:35 a.m.)

THE COURT: Ladies and gentlemen of the jury, since getting your two notes we have been in consultation as to how we can be of service to you. By "we," I mean counsel on both sides and the Judge.

Personally, I would like to labor under the belief that some of the requests here from you are really nothing but an enticement to get me to come out here so that you can view further my pleasant personality and the sound of my voice. You want a repeat performance. I thank you for the compliment. I would like to indulge in that reaction, but I say that as an attempt at humor. I know that what you

really want is enlightenment, and I hope I can give you what you seek.

Let's take up your first note.

"If a defendant is considered guilty of a relatively minor offense, may he be acquitted, or may the jury recommend mercy?

That's relatively easy, and I hope I can get it across.

The World Series came to a close yesterday. You know enough about the game to know what I mean when I say that when a man is running from one place to another he is either safe or out. He either made first base or he didn't. There is no inbetween. Here there is a specific charge against a defendant. You have no middle course or other course. He is either guilty or not guilty of that particular charge. You can't substitute or cut it down. That is the charge.

Now, we happen to know that this is a serious charge in criminal law, and you know that, too. But suppose it were another kind of charge, one-fiftieth as serious as this charge. The law would require you to apply the same standards of guilt and innocence as I defined for this case. Always the question is:

Is he guilty or not guilty of that particular charge?

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So you have to ask yourselves:

Is this defendant that you are considering guilty or not guilty of the conspiracy charge, which is Count 1? Does the evidence convince you beyond a reasonable doubt on each one of the elements that I told you you must be satisfied on, and if your answer is it is not enough or there is some evidence on this element but not enough on some other element, out. You acquit him, no matter what you think of him. The law is not concerned with personalities. The law is concerned with the principles of the law in order to determine guilt or innocence, not with who the defendant is.

We boast that the worst person will get his full trial. Didn't we say so? Even I said if an avowed enemy of our society were to stand trial the highest award we could reflect is he had a fair trial, this avowed enemy of our society, and he is guilty, he is guilty.

But if the principles of law do not measure up in his case, you let him walk out even though you think he is the avowed enemy of society. He is not getting away with anything. Why? Because the emphasis is not on him, but the emphasis is on what the law makes imperative, and that is the application of the standards of the law that are applicable in order to determine the guilt of the one charged.

Suppose you were here in a case where a defendant you regarded as a pretty fine, high-class human being -- that's the impression you got, you still have to decide his guilt or innocence according to the same standards, and that is whether or not you are satisfied beyond a reasonable doubt of his guilt, taking all the facts and circumstances revealed in the jury trial record and applying the law that the Judge said must be applied in connection with that particular criminal charge.

I told you about the errand boy, and I told you about the captain, and I told you it makes no difference, the issues are the same.

You have not got the power to exercise any clemency. That's the Judge's job.

Suppose you say -- and you would be right, generally -- well, when the Judge comes to sentence him he is going to take into consideration that this man was relatiavely good and a nice human being and there is a lot in his favor.

Of course the Judge will consider that, but does that give you the right to decide his guilt that way, just because you think the Judge is going to be easy with him? Of course not. You would be violating your oath.

Because, don't you see, that has nothing at all to

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to do with guilt or innocence.

You are the surgeon. Post-operative care will be taken care of by others. What do you do when that patient is on the table?

And so I repeat, the only standard that should govern you, that should control you, and should dictate your course, is the simple one that I have repeated backwards and forwards, and I have asked you repeatedly, did you understand it, and you told me you did; since you have had second thoughts about it I will stay here for hours until you are absolutely crystal clear on what the law has to say.

You apply the same measure with regard to each one. You take Defendant 1, I don't care which one you consider, 1 or 2, that doesn't make any difference. You take one of the defendants, and you say "Now, what evidence is there with regard to him? What's the total evidence reflecting his participation, if at all, in the conspiracy? Did he know about it, did he participate in connection with it, was he aware of it, did he do any acts with regard to it? The Judge told us what the criteria are, he spent a lot of time telling us that. Am I satisfied as an American minister of justice, am I satisfied of his guilt beyond a reasonable doubt applying the law that the Judge told us we must apply, and that is if we are satisfied beyond a reasonable doubt on

all the elements that go into making up the crime of conspiracy. The Judge told us what they are." If you want them again, I will give them to you again.

You have to be satisfied on each one of them beyond a reasonable doubt. If you say "Yes, I am satisfied he is guilty," then, whether his role was minor or major because that has nothing at all to do with it. I kept emphasizing what you must look to.

Suppose, in other words, you find that a defendant played a relatively minor role and he didn't do as much as the others, but you know that he did something in connection with that conspiracy, he knew about it, and he participated in it, even to a minor degree, and all the other elements have been spelled out beyond a reasonable doubt, you have got no alternative but to find him guilty.

But if you have doubt about it, then acquit him. He is entitled to it. Why? Because the demands of the law with regard to his case have not been fulfilled. You entertain a reasonable doubt on one point, or on two points, or whatever it is. But you must be convinced beyond a reasonable doubt on each of the elements that I told you go to make up a conspiracy.

Have I got it over now? I want you to be sure of it. Just raise your hands right now and ask any question on

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that particular point we are talking about: "But, Judge, such and such." Then maybe I can answer it and define it even more sharply than what I have up to this moment.

So I take it then that you feel safe that you understand what I am talking about, what I have just got through saying.

Now you say, "May the jury recommend mercy," and you know what the answer is to that; the answer is clearly, no, it is not your job. You've got enough to do.

Ask yourselves, too, do you think the Judge is not going to know what to do with any defendant found guilty? That's up to the Judge. What do you think, I haven't got any mercy, I haven't got any compassion, I have no understanding? What do you think any judge does? He can't wait to sentence somebody?

Use your heads. I told you this is one of the most ugly performances, the most burdensome of a judge. But what does that mean? It means that no Judge who is conscientious and worthy of his oath looks upon it as a minor matter. But that's got nothing at all to do with you and it is not one of your problems. You do yourselves credit that you are merciful, that you have understanding, and you do have compassion. That is a compliment to you. But the Judge says, in plain language, it is none of my business,

and that's it.

Now, you say, "What extent of action is necessary in order to constitute conspiracy?"

Do you mean by that what extent of activity or participation makes a defendant a member of the conspiracy? Is that what you mean when you say what extent of action is necessary in order to constitute conspiracy?

Or, do you mean what is a conspiracy, what constitutes a conspiracy?

Now, which is it?

JUROR #1: It is what constitutes.

THE COURT: What constitutes a conspiracy?

JUROR #1: Yes.

THE COURT: So you want me to tell you again what is a conspiracy, and who the law regards is a member of a conspiracy? Is that what you really want?

You nod your heads. Is that what you really want?

What do you say?

JUROR #10: Yes.

JUROR #1: Yes.

THE COURT: If I give you all of the law again on conspiracy and what the law demands with regard to participation by a defendant in a conspiracy, do you think that will be

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helpful and more particularly, do you think that is just about what you want by your notes?

Just give me a minute.

Madam Forelady, what is your answer to my simple question? Would that do it?

JUROR #1: Yes.

THE COURT: Would that do it, Mrs. Saunders?

JUROR #2: Yes.

THE COURT: Would that do it Mrs. Morrill?

JUROR #3: Yes. I think a brief rundown. I know how long it took you yesterday.

THE COURT: You're kind, but I don't want to save myself. I can't leave out a word or a sentence. It can't be minimized. I have got to give it to you all or nothing, and I intend to give it to you all. You're very kind and solicitous, but I have to do it that way.

Do you think that will answer the problem that the jury wants me to help resolve, Mrs. Golden?

JUROR # 4: I don't think we intended to ask you for that, your Honor.

THE COURT: What do you think?

JUROR #4: I think we intended to ask you a couple, two or three of the headings of what you told us yesterday, and not -- there was something about an overt act,

there was something about conferring. The main components.

THE COURT: All right. Fine. That would be included in what I have in mind, and I can't just skirt it. You see, I would include that, of course.

Mr. Payne, do you think that sizes up the problem right now?

JUROR #5: Yes, sir.

THE COURT: What do you say, Mr. Brettschneider?

JUROR #6: Most of the jurors want that.

THE COURT: But others don't seem to want it, is that it, they seem to be satisfied. But if one juror wants it, that juror gets it.

What do you say, Mrs. Vining?

JUROR #7: I think it would be a good idea to refresh all of us. It is a long complicated law.

THE COURT: Yes. You had so much it would do no harm at all and it might do some good. I hope so.

Mr. Sprung, do you think that would do it?

JUROR #8: I think so, Judge.

THE COURT: How about you, Mrs. Smith?

JUROR #9: Yes.

THE COURT: How about you, Mr. Falcone.

JUROR #10: Yes, sir.

THE COURT: Mrs. Harrow?

JUROR #11; I thought you answered it when you said if he gets to first base.

THE COURT: I have conferred a degree of doctor on you, so I have to ask you, Dr. Cogen, what do you say?

JUROR #12: That's fine.

THE COURT: All right, let's go.

I want order in the courtroom. I don't want to raise my voice and I don't want to strain myself. Just keep quiet, all of you.

What does the law mean by conspiracy? Possibly at the very outset of this discussion a simple example should be given in order to give you some suggestion of what we deal with here.

Take an example of A, who says to B, "I have decided I am going to rob that bank down the street;"and B says, "When are you going to do it?" And A says, "I don't know, but I'm figuring on doing it soon," and B says, "What's wrong with me, why don't you count me in on it?" A says, "Okay."

"I don't know what's the best time to do it, maybe in the evening, I don't know what hour, but we are going to do it."

That's it. That is the conversation, and there you have a conspiracy insofar as two of the three elements of

a conspiracy are concerned. Why?

One, you have a combination of two persons at least who agree to do an unlawful act -- that is, rob a bank -- and each was a member of the conspiracy.

Let's go one step further. B, on his own, without telling A, who made the proposition in the first place, gets on the telephone with the bank, a perfectly innocent call, but with the intent of furthering the objective of the conspiracy, and he says, "What time do you close on Thursday evening?"

Now, that is a step that was taken by one of the members of the conspiracy, and that is what the law means by an overt act, a step taken to further the objective of the conspiracy.

You will remember I told you it doesn't take much to bring a meeting of the minds, and I gave you an example of the buying of a bottle of milk. Do you remember all of that? And I told you that has the same element of whether there was a meeting of the minds as there would be if there was an extensive contract with a thousand professions in between the two gigantic corporations, you still have to ask was there a meeting of the minds? That means, does each one understand what is involved, the full extent of what is involved. Going and getting the bottle of milk is the full extent of

what is involved, not a ham, not other things.

Then I gave you other examples. Suppose two or more persons agree among themselves to counterfeit money or to illegally transport alcohol, or as in the case before you, to distribute narcotics, and a single step is taken to further or advance the objective of the conspiracy, the crime of conspiracy has been committed.

I told you and I emphasize this is so even though the conspirators did not actually go so far as to actually conterfeit the money, actually transport the alcohol, or actually distribute the narcotics.

If in addition to the conspiracy itself the counterfeiters, or any of them, proceed to execute the conspiratorial plan by actually, in the crude example I gave you, robbing a bank or counterfeiting money or transporting alcohol or possessing with intent to distribute narcotics, then a separate crime is thereby committed, and that separate crime is what we call the substantive crime.

So, one is the planning, which is a crime in and of itself, and two is another crime distinct and apart, and that is the carrying out of the conspiratorial plan.

The law has in mind that when people get together and start to inquire, look out, we will make it a crime even though the object of your conspiracy is not executed. You

start to plan, says the law -- and I gave you the example of the octopus, and it begins to spread the tentacles, and the understanding of the law and Congressional intent is that you have got to stop it before those tentacles invade a whole community or a part thereof, and the difficulties will be beyond imagination, very difficult to catch up with.

And so you say it is a crime if you plan to violate a federal law.

That very planning is a crime in and of itself.

Then I told you the law after all deals with human nature and when you start to plan one thing leads to another and a series of events may ensue. So the law has in mind the need to throttle at its very inception the illegal idea of trying to plan to do something that is illegal.

A conspiracy cannot exist without at least two persons whereas the separate crime to carry out the objective of a conspiracy can be violated of course by one person. Take that crude example I gave you of robbing a bank. It takes two at least to make a conspiracy. But suppose only one went ahead and robbed the bank. It only takes one to actually rob the bank. The fact that two of them were going to do it and one of them may have decided not to, you have only got one to deal with in connection with the actual robbery of the bank. But does that let the other fellow who didn't go and rob the

bank, does that let him off of the conspiracy charge? No.

Putting it more simply, it is a crime to conspire or plan to commit a crime, and it is another crime if the plan is carried out. Hence, you have Count 1 which charges a conspiracy, and you also have the substantive counts, 2 through 10, 14, 15 and 16, which are the acts that are alleged to have been committed by carrying out that very conspiracy.

So in essence, you have them planning, says the charge, conspiring to violate the federal law about possessing narcotic drugs with intent to distribute, and then you have got some of them, says the indictment, who actually went ahead to carry out the objective of the conspiracy and did actually with intent and knowingly and unlawfully possess with intent to distribute the narcotic drugs.

Take a specific example of the defendant Chapman. He is one of the eight defendants before you charged with a conspiracy. But Chapman is not charged with anything other than the conspiracy. He is only charged with conspiracy. So you ask yourselves, what is the charge here against Chapman, what are the charges against X and what are the charges against Y and Z and A and B and C, all the way down the line.

You take each one separately like you do eight different students in Dr. Cogen's life, or eight different

customers in your life. Each has a different situation and different problems, but you resolve the same kind of problem by the same standards.

So I went into the reason why this has come to pass, the law with respect to conspiracy. A collective criminal agreement I pointed out to you, that is a partnership in crime, creates a greater potential threat to the public than the lone wrongdoer.

Concerted action for criminal purpose often if not normally makes possible the attainment of ends more complex than those which an individual acting alone could accomplish. Group association increases the likelihood that the criminal objective will be successfully realized and renders detection more difficult than the instance of a sole aggressor.

Now, that is nice language, but that is exactly what I told you was the purpose of the law. It was because of these and other reasons that Congress made a conspiracy or concerted action to violate a federal law a crime entirely separate, distinct and different from the substantive law which may be the object of the conspiracy.

These defendants are charged with conspiracy together and with others. What in law then, in legal language, is a conspiracy?

In essence, it is a crime to conspire to plan to

violate a federal law. I repeat, there is no need here to prove an actual violation of another federal law. In other words, it is not necessary to show that the conspiracy succeeded. See how often I come back to drive home that point?

Suppose in those crude examples I gave you to rob a bank every one of the elements was present. There was a conspiracy of two people, a meeting of the minds, they both consented to be members of it, an overt act was taken, and suppose after all that is done they say, "Nothing doing."

For this reason or that reason I don't want to do it, or "My mother said, remember Jimmy, you haven't been acting nice recently, remember what I taught you," and Jimmy says, "Mama, I haven't been too good, and I am going to do my best, and I am going to really be the kind of man that you wanted me to be."

And so he says , "I am not going to go through with it, I am not going to rob the bank."

He is guilty of conspiracy nevertheless because, one, there was a conspiracy, and, two, he was a knowing member of it, and, three, the overt act was performed.

Now, do you get it? And so you ask yourselves in regard to each one of the defendants, whether he played a minor role or a major role, was there a conspiracy, am I

satisfied beyond a reasonable doubt that the conspiracy set forth in the indictment did actually exist, and was Defendant X a member of it, a knowing member, a wilful member, and was there an overt act committed, and am I satisfied on each one of those three elements beyond a reasonable doubt?

And if you say yes, that's the end of it. Guilty. If you are not satisfied on each one, not guilty.

Suppose you are satisfied not only beyond a reasonable doubt by beyond any possible doubt that there was a conspiracy, but you are not satisfied beyond a reasonable doubt that X was a member of it. And suppose you are satisfied beyond all possible doubt that the overt act which the law demands has been established. He is entitled to an acquittal because you were not satisfied beyond a reasonable doubt on each one of those three elements.

Two or more persons may agree to violate a federal law. That alone constitutes in essence the crime of conspiracy. If they actually violate the law they conspired to, that constitutes another separate and distinct crime.

In order to find the defendant guilty of the conspiracy count the government has the burden of proving beyond a reasonable doubt three elements that I have already mentioned, and they must prove every one of these three elements beyond a reasonable doubt. I didn't say prove two of

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them beyond a reasonable doubt, I said prove every one of the three, each one, beyond a reasonable doubt.

Suppose we say as a rough example that reasonable doubt means one full pound. Well, here's all the evidence on that one, yes, it weighs a pound. Then take all the evidenc with regard to the second element, it weighs a little less than a pound, you take the third element and it is over-whelming, it is ten pounds.

The defendant has to be acquitted. Why? Because one of the elements do not weigh a pound. It was not beyond a reasonable doubt. I don't know what other examples to give you.

The first element then, repeating again, that the conspiracy alleged in the indictment existed.

Two, that the defendant, and this applies to each one of them -- you put the same test to each one -- that the defendant was a willing and knowing member of that conspiracy.

Thirdly, that a step was taken to further or carry out the objective of the conspiracy.

A conspiracy is a combination or agreement of two or more persons by concerted action to accomplish a crime or unlawful purpose. I am going to give you this in Thomas Babbington McCauley English and I am going to give it to you in the marketplace English, and if I knew that you understood

Yiddish, or Latin, I'd try it that way. I may have a little difficulty with the Latin.

The gist of the crime is that unlawful agreement or combination to violate the law. A conspiracy is sometimes called a partnership in crime in which each member becomes the agent of every other member. To establish a conspiracy the government is not required to show that two or more persons sat around a table and had a written agreement, and you know all of that. I don't want to insult your intelligence by telling you they don't have to get together before a notary public. If that ever comes to pass every one of them ought to be picked up and taken to Bellevue.

It is sufficient if two or more persons in any manner through any contrivance impliedly or tacitly come to a common understanding to violate the law. Sometimes, as I gave you in the example of robbing a bank, that requires only a few words. Express language or specific words are not required to indicate assent or attachment to a conspiracy.

I gave you the example of B saying how about counting me in? That's all. I gave you the example in the civil part of a bottle of milk in determining whether there has been an unlawful agreement. You may judge the acts or the conduct of the conspirators which are done in an apparent attempt to carry out a criminal purpose.

The old adage I told you, and I tell you again, that actions speak louder than words is certainly applicable here.

So dealing with the first element that must be proven beyond a reasonable doubt, that is the existence of the alleged conspiracy, you are not to dismember it and view its separate parts but you are to look at it as whole. Consider all the evidence from start to finish, all the evidence which has been submitted with respect to the conduct, the acts, the declarations of each of the alleged parties, and such inferences as may reasonably be drawn from those circumstances.

If on the basis of the sum total of such evidence and the reasonable inferences to be drawn from it you are convinced that the minds of at least two alleged conspirators met in an understanding way in an agreement to seek to achieve the unlawful purpose I have already pointed out to you then this element of the offense is established.

In this connection it is not necessary for the government to prove the success of the conspiracy in order to establish a violation of the conspiracy statute. I repeat. Persons may be guilty as parties to a conspiracy even though the objectives they undertake to achieve were never accomplished.

Usually the only evidence available is that of

disconnected acts on the part of the alleged conspirator, which acts however when taken together in connection with each other show a conspiracy or an agreement to secure a particular result as satisfactorily and has conclusively as more direct proof.

If you find the parties got together then to accomplish something unlawful then a conspiracy is shown even though you may find the individual conspirators may have done acts in furtherance of the common unlawful design apart from an unknown to the others so long as those acts were done to carry out the same objective of the conspiracy.

Not everyone does the same job. The man on top does one kind of job. The fellow next to him has a different kind of function to perform. The fellow way down at the bottom runs the errands. But each one of them, if each one of them knows what the objective of the conspiracy is, and is a weilling and knowing member thereof, he is bound by the acts of everybody done in or outside of his presence if done in connection with the furtherance of the objectives of the conspiracy.

By this time you must recognize, I'm sure, that a conspiracy may exist even though all the conspirators were not there at the very beginning of the formulation of the conspiracy. Suppose in that rough example of robbing the bank

with A and B getting together and agreeing to do that, suppose a third fellow comes along after A and B had set up the whole thing and had gone into it, and the third fellow, C, comes along, "Hey, I hear you two guys are going to rob a bank. What about me?"

He wasn't there at the beginning when it was all set up to plan it, but if he is told what the objects are and what the plan is, he is in on it just as much as they. The fact that he joined later hasn't got a thing to do with it as long as he knows that there is a conspiracy, there is a plan, there is an agreement, there is an understanding to rob the bank, and that's the plan, and he wants to be a part of that conspiracy, to help plan it and participate in it, the fact that he comes in even a day before they start out to rob the bank, if they should do it -- if he knows all these things he is a member of the conspiracy.

To put it another way, each conspirator need not know of every act done in furtherance of the conspiracy by the other co-conspirators in order to have a conspiracy exist. Under the law a conspiracy once formed is assumed to have continued until the object has been accomplished or it has been abandoned by all its members or it has been frustrated as by arrest or unless there is affirmative proof offered of withdrawal or disassociation.

In determining whether the charge of conspiracy has been made out in this case, it is your task and your task alone on this first element of conspiracy, to judge the total picture of the asserted acts and conduct of the alleged conspirators which are claimed to have occurred for the purpose of forming and promoting the criminal agreement and seeking the alleged criminal objective.

Like many or most of the things in the law, a conspiracy is not required to be established by so-called direct evidence. The unlawful agreement or understanding which as I have said is the heart of the matter may be found if it was found at all as a matter of inference from the conduct of the people alleged to have conspired or participated in the conspiracy.

So, if you find that you are satisfied beyond a reasonable doubt that the conspiracy as charged did actually exist within the time period set forth, you must next decide whether the defendant to whom you are addressing your efforts--and this applies, therefore, to each defendant -- you have to ask yourselves, was he a member of that conspiracy? That element, too, must be established beyond a reasonable doubt as I have defined reasonable doubt to you. In short, whether or not a defendant was a member of a conspiracy may be determined upon the reasonable inferences to be drawn from all the

evidence in the case, including the evidence that you heard as to his own actions, his own conduct, his own connection with the acts and conduct of the other alleged co-conspirators.

Putting it more succinctly, the government must prove that the defendant knowingly and wilfully joined the conspiracy during the period of its operation with the intent and purpose of furthering its objectives.

I repeat:

The government must prove that the defendant knowingly and wilfully joined the conspiracy during the period of its operation and joined it with the intent and purpose of furthering its objectives.

I want to caution you that mere association with one or more conspirators does not make one a member of the conspiracy. Mere presence at the scene of a crime and knowledge that a crime was being committed are not sufficient without more to establish that a defendant was a participant in a conspiracy or aided and abetted the crime. Likewise, the mere presence at conspiratorial discussions and knowledge of the existence of the conspiracy are not sufficient by themselves and without more to establish the defendant is a member of the conspiracy.

Take the example that I gave you, the rough example of robbing the bank, getting together and saying that

X was there too, and just listened, and who knows that A and B are planning this robbery, to rob a bank, but he doesn't do anything except he is a spectator, he listens. They like him, and so he is allowed to be present.

Well, he knows what they are going to do, but he hasn't made himself a part of it. That's the test. He did not say, "Count me in," or "I want to go along with you," he was just a spectator. The law is not going to say that just because he knew what was going on that therefore that's the equivalent of his actually being a participant in the conspiracy.

That, too, is obvious. He was a spectator, that's all. But once he agrees to enter the conspiracy, he knows its objective, then he sits and listens and doesn't do anything with regard to some part of it, that doesn't let him out.

You have to ask yourselves, was he actually a member of it? And you look to see what he has done. If he did anything to help be convinced of it beyond a reasonable doubt. These are the ways you make up your mind as to whether he actually was a member of the conspiracy.

In other words, in order to convict you must find from the total trial record that he was a participant in the conspiracy and not merely a knowing spectator. You must focus upon the defendant's relationship to the crime and not

solely upon his relationship with others accused of committing the crime. His relationship to the crime must be sufficiently substantial to satisfy the concept of personal guilt. What's necessary is that the defendant particpate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful aims.

I repeat. What is necessary is that the defendant participate with knowledge of at least some of the purposes of the conspiracy and with intent to aid in the accomplishment of those unlawful aims.

That does not necessarily mean he has to do what we call spade work. He can get on the telephone, make a couple of calls, and he is as much a member of the conspiracy as the fellow who is doing something every other minute in connection with the furtherance of the conspiracy.

So long as the defendant in making a telephone call, and other calls, or whatever other simple thing he may have done, was a member, a knowing member, a willing and knowing member of the conspiracy.

A defendant may not know all the conspirators, yet if he knows there is a conspiracy and if he has knowledge of its basic common objectives and aims and joins it then he adopts as his own the past and future words and acts of all the other conspirators in furtherance of the conspiracy, as he

understands it, even though he may not have been present when the words were said or the acts done. A person becomes a member of the conspiracy by associating himself, however informally, with the common plan or scheme knowing the central aim or principal purpose of the overall plan or scheme, and intending to aid in some way even a minor way, to bring about the success of the plan or scheme.

And hence it comes about that you have the captains and lieutenants and the fellow on the lowest rung of the ladder. That's worth repeating. A person becomes a member of a conspiracy by associating himself however informally with the common plan or scheme knowing the central aim or principal purpose of the overall plan or scheme and intending to aid in some way, even a minor way, to bring about the success of the plan or scheme.

The basic question is:

What was the scope of and nature of the agreement as the defendant saw it? What persons and what needs of activities did he have a good reason to believe were involved in furtherance of the aiding of the conspiracy?

Knowledge is a matter of inference from the facts proved. It is not necessary that a defendant be fully informed as to all the details of the scope of the conspiracy in order to justify an inference of knowledge on his part.

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To have guilty knowledge a defendant need not know the full extent then of the conspiracy, and all of its activities and actors.

However, there is need to find and find beyond a reasonable doubt that a defendant charged with conspiracy had knowledge of the general illicit purpose of violating a federal law.

Accordingly, to find a defendant before you guilty under the conspiracy count, you must find that he entered into the conspiracy with specific criminal intent and knowledge, and the only way you have of answering or arriving at the state of mind of a defendant in the case before you is to take into consideration all the facts and circumstances shown by the total evidence.

If a defendant was there at the time of a conference and he sat by and listened after he was a member of the conspiracy, and he knew what the step was going to be, and even if he himself was not called upon to make that step, and you're told he was there, that's one piece of evidence. That helps you, if you believe it, decide whether he was a knowing and willing member of the conspiracy. He was present at the conference dealing with narcotics.

You take that, and you had whatever else there is in order to determine whether or not you're satisfied beyond

beyond a reasonable doubt that he was in truth and in fact a knowing and willing member of the conspiracy.

We won't need you if there was a written paper. That would be cinch. But there are no written papers. Therefore, you have to decide -- and it is more difficult -- of course -- you have to decide whether from all the facts and circumstances you are satisfied, and all the inferences to be drawn from those facts and circumstances, you are satisfied beyond a reasonable doubt that the defendant you're considering was a knowing and wilful member of that conspiracy.

Knowing means that he knew the objectives of the conspiracy, and was willing to be a participant in it.

I charge you further that by becoming a partner in a conspiracy a defendant assumes all the liabilities of the partnership, including those that occurred before he became a member even. It is not required that a conspirator know all the members of a conspiracy. A conspiracy and a defendant's participation therein, may be inferred from such facts and circumstances in evidence as logically tend to sustain that inference.

The independent evidence of illicit association in a conspiracy may be totally circumstantial. To find any defendant guilty of conspiracy, you must find that he knowingly and intentionally participated therein.

This means that a matter acted deliberately and with knowledge and purposely participated therein, intending to violate the law rather than through inadvertence, mistake, or negligence.

In determining whether or not any other person was a party to or a member of such a common plan the jury is not to consider what others may have said or done. That is to say, the membership of a defendant in such a common plan must be established by evidence as to his conduct -- that is, what he himself knowingly said or did. If and when it appears from the evidence direct or circumstantial in the case that such a common plan did exist and that the defendant was one of the members of the plan, then the acts and statements by any person likewise found to be a member may be considered by the jury as evidence in the case as to the defendant found to have been a member even though the acts and statements may have occurred in the absence and without the knowledge of the defendant, provided such acts and statements were knowingly done and made during the continuance of the common plan or conspiracy and in furtherance of some intended object or purpose of the plan.

Put otherwise, any statement or admission made or act done by one person outside of court may not be considered as evidence against any person who was not present

and did not see the act done or hear the statement made.

To sum it up, the government must establish beyond a reasonable doubt that a defendant, aware of its purposes and objects, entered into the conspiracy with a specific criminal intent, that is, that a defendant knowingly did an act which the law forbids, purposely intending to violate the law.

Should you find beyond a reasonable doubt that a conspiracy existed and that based on proof of its actual participation therein a defendant was a member, then the acts and declarations -- and I have said this repeatedly -- then the acts and declarations of any other person you may find was also a member of that same conspiracy made during its pendency and in furtherance of its objectives are considered the acts of all the current members, even though they were not prepsent.

This is so because when persons enter into a conspiracy to accomplish an unlawful aim, they become responsible for one another in carrying out the conspiracy. And thereafter the acts and declarations of others who you find to be members of that same conspiracy may be considered against the person if you find the defendant to be a member of a conspiracy where those acts and declarations occurred and if those acts are done and declarations made in furtherance

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of that very same conspiracy.

Let's take the example of counterfeit money. Two of them get together to counterfeit money. That's their plan. And they do a lot of steps in connection with it. The day before they're caught a third fellow comes along and knows what it is, what's involved, what they plan doing, and they agree to take him in.

He wants to be a willing member, he wants to go along to see if he can't make some money for himself out of this deal. He knows what they plan to do and he wants to be a member of it. He may be the most amazed fellow when he finds out later that what he thought was going to be on a small scale they have counterfeit money that fills fifteen attics. He can't get off on that. He can't say "I know the plan was to counterfeit money, but I had no idea it was going to be on that grandiose scale."

He knew what the objective was, and the fact that one of the members goes and does it on a large scale, as long as it was to carry out that objective, he cannot be heard to gripe about that. That doesn't let him off.

A lot of things may be taking place in connection with that counterfeit. He doesn't know the first thing about it. He didn't know they were done. Let's say twenty-five different acts. He didn't know the first thing about it, and

you believe it. But if each one of those twenty-five acts were done in furtherance of the overall conspiratorial plan which he knew about, and he was a willing and knowing member of it, he is stuck with it, with each one of those twenty-five acts. That's putting it very simply.

Have I gotten that part over? Are there any questions by anybody with regard to that portion?

Now we come to the overt acts and that won't take long.

MR. LANG: Your Honor, I think there was a hand raised.

THE COURT: Speak up. Just don't raise your hand. Say, "Judge, my name is, and I want to say something," the way they do it on television.

JUROR #12: I don't know, I may be belaboring the point, but --

THE COURT: Don't hesitate. Speak up.

JUROR #12: You seem to be stressing the fact that conspiracy is an agreement to do something illegal. But in the case, the supposed case of the bank robbery, there was more than an agreement. The man made a phone call. I am wondering, I think we are all wondering, to what extent an act of that kind or some other kind is essential in order to constitute a full conspiracy.

THE COURT: That is, I think, relatively simple. I have kept saying to you that there are three elements. I didn't say there are two. I said first there must be a conspiracy of two or more people, and I told you secondly that each must be a member, a knowing member, and a willing member of the conspiracy, and I also told you that there had to be a third element, and that is an act to carry out the objective of the conspiracy.

Don't you remember I explained yesterday why does the law insist on it? I said because people might get together and plan to violate a federa. statute and agree to do it and are well aware of what they are doing but they abando it because they don't take any step with regard to it and the law says well they abandoned it and we are not going to hold them responsible.

The way you know that they intended to carry out that conspiracy is by an act that is actually done, one simple act, like a telephone call to the bank -- "Are you open in the evening on Thursday?"

Don't you remember I emphasized on its face a perfectly innocent call, what's wrong in asking the bank what hours you have got in the evening. But if the purpose of that call was to further the objective of the conspiracy, which was to plan to rob a bank, there is a step taken to further

the objective of the conspiracy, and that means they intended to go ahead, they didn't abandon the conspiracy. They took an overt, tangible step with regard to it. That shows intent to fulfil or carry out the conspiracy.

Have I made that clear?

JUROR #12: Yes, sir.

THE COURT: Now we go --

JUROR #3: I have a question about that, too.

If someone decided to be a part of a conspiracy then that person is held responsible for all the overt acts listed in that indictment, is that right?

THE COURT: Right, ma'am.

JUROR #3: But is there any pull over to the substantive counts?

THE COURT: I'm coming to that. I'm coming to that. You're smart. I'm giving you more than a passing mark. I am giving you a high mark. I hope you will at least give me a passing mark, that's all I ask for.

Now we come to the overt acts. We come to the third element now of the conspiracy count that you must consider and that must be established beyond a reasonable doubt, like each of them, and that is whether an overt act took place, whether there actually was a telephone call made in the crude example I gave you.

The offense of conspiracy is complete only when the unlawful agreement is made and any single overt act to effect the object of the conspiracy is thereafter committed by at least one of the conspirators.

What is this overt act? It is any step or action or conduct, even innocent on its face, like a telephone call, which is taken to achieve, accomplish, or further the objective of the conspiracy.

The purpose of requiring proof of at least one overt act is that while parties might conspire and agree to violate the law they may change their minds and do nothing to carry it into effect in which event it would not constitute an offense.

The overt act need be neither a criminal act nor the very crime which is the object of the conspiracy. It need not be committed by the particular defendant under consideration.

Then you have before you the overt acts, all listed there. Some of them perfectly innocent on their face. But the government must under the law set some of them out in the indictment. Not necessarily all; of what it contends are the overt acts.

You see, parties may conspire and agree to do an unlawful thing and then may change their minds and not go

through with it and drop it and pull out of it right away, and so the law says "When you do an overt act, however, in furtherance of it, that shows you were in it, you had not abandoned it, you undertook to fulfil its object or objective."

The prosecution under our law is not required to set forth in the indictment each and every act on which it relies to establish the conspiracy or the defendants' participation therein, nor is it required to prove each overt act which may have occurred during the furtherance of the conspiracy.

It is required to prove at least one such act did take place. The overt act or step essential to sustain the conspiracy need not implicate all the conspirators nor is it required that each of the conspirators participate in or commit that particular overt act. It is sufficient that such overt act was performed by any one or some of the conspirators.

This is so since the act of one conspirator, as I have already pointed out, done in furtherance of the conspiracy, becomes the act of all the conspirators.

Going back to that crude example of planning to rob a bank, I told you that A did not know that B was going to make a telephone call to find out the banking hours in the evening. He didn't know that that was being done at all.

But the fact that it was done satisfies that element and A is stuck with it. He is held responsible for what B did to create that overt act.

The guilt of the conspirator is not measured by the extent or the duration of his participation in the conspiracy, nor is it necessary that he receive a pecuniary benefit for his participation. That is the law. If the defendant participated in the conspiracy to a more limited degree than others, or if he received less benefit than others, he is equally culpable so long as he was in fact a conspirator.

That's it. And then I talked to you about multiple conspiracy, if you remember, that there may be many conspiracies and you all shake your head. If you want me to give that to you again, I will give it to you again. Do you think that is necessary?

JUROR #3: No.

JUROR #6: No.

THE COURT: Just hold it. I want to finish all your notes. There are other points.

If a defendant should be found guilty of one act of conspiracy to what extent, if any, is he responsible for other subsequent acts of the other defendants?

I think in the light of what has happened this

morning I think you would want to withdraw that question on the ground that I have made it so clear that you don't need to bother with that, but I am going to answer it nevertheless.

The answer is obviously no, a thousand times no. If a defendant is found guilty of a conspiracy but is not a willing participant and does not have the intent to do anything with regard to the substantive act, how can you rope him in on that?

What is required is that you ask yourself whether that particular defendant continued to do anything that the law makes imperative before you can find him guilty of any of the substantive acts.

Let me give it to you another way. Just bear with me. I will get it.

Do I need to read you what the law has to say with regard to what constitutes unlawful, wilful and knowing conduct?

JUROR #3: No.

JUROR #11: No.

THE COURT: Here we go. The law says, in essence, "It shall be unlawful for any person knowingly or intentionally to distribute or to possess with intent to distribute a controlled substance."

That's the substantive law respecting the

substantive counts and each one of them.

What is required to establish the guilt of the person charged with a substantive act such as is embraced in the indictment before you? There are three elements.

First, there must be proven beyond a reasonable doubt that on or about the date set forth in each count the defendant or defendants named in that count distributed or possessed with intent to distribute the narcotic drug controlled substance. You have to be satisfied of that beyond a reasonable doubt.

Secondly, that they did so unlawfully, wilfully and knowingly.

And, third, that the substance which the defendant or defendants named in the count possessed was in fact a narcotic controlled substance.

You will note that the first element of the offense is distribution of the drug or possession with intent to distribute the drug.

What does that phrase mean?

Well, the word distribute means the actual constructive or attempt to transfer the drug. The word possess has its common every day meaning, and that is to have something within your control. It doesn't necessarily mean to have it in your hand or pocket. Control may be

demonstrated by the existence of a working relationship between the person having such control and the person with the full physical custody. And that word "intent" refers to a person's state of mind so the term "possess with intent to distribute" can be fairly stated to mean to control an item with the state of mind or purpose to transfer that item.

On this element the government contends that it has proved beyond a reasonable doubt that the defendants knowingly transferred the drug and possessed the drug and that at the time they possessed it their mental state was such that they were transferred to someone else.

If you find beyond a reasonable doubt that such transfers were made, I charge you that each such transfer satisfies this requirement in the statute.

As to the second element, the terms unlawfully, wilfully, and knowingly, even though, ladies and gentlemen, you told me you are satisfied, I want to bring it home again -- you have got to ask yourselves -- are you satisfied beyond a reasonable doubt that the defendants named in the substantive counts knew what they were doing and they did it deliberately and voluntarily as opposed to mistakenly or accidentally or as the result of coercion.

Of course, it is not necessary that the defendants knew they were violating any particular law. Rather, it is

sufficient if you are convinced beyond a reasonable doubt that they were aware of the general unlawful nature of their acts.

Then the third element that must be proven beyond a reasonable doubt. Heroin, I told you, and cocaine, are narcotic drug controlled substances. I further charge you that you must be convinced beyond a reasonable doubt that the substances possessed or distributed or possessed with intent to distribute was in fact a narcotic drug.

I don't think I need to go into all of that. That is the simplest of them all, as to whether or not what we are dealing with here is a narcotic drug.

And so you see you ask yourselves whether or not the person that you are considering with regard to the substantive count was a member of the conspiracy and did he go further, did he with full intent, do anything wilfully, knowingly, with respect to his possessing or possessing with intent to distribute the drug.

The fact that someone else did it doesn't satisfy the question. The question is did he, the one you're considering, know and intend to possess or possess with intent to distribute the narcotic drug.

If the defendant you are considering you have found meets the requirements, or rather the proof of the law

meet the requirements that the law makes imperative in order for you to determine his guilt of conspiracy, and you have so determined, and you go and you apply the elements as to the substantive count in which he is named, and you are satisfied beyond a reasonable doubt with regard to those substantive elements or elements with regard to the substantive count, but he didn't actually have or possess in his hand that drug named or specified in that count under consideration, and it was physically held by someone else, with intent to distribute, he is guilty.

Do you remember the diamond example? The test isn't who holds it. The emphasis is always on knowledge, intent, not whose got it. We learned that as kids when we used to say possession is nine-tenths of the law. What did we mean by that? It means that if we actually got it, that in and of itself, shows that you were the owner of it, that's what it meant. That is a different proposition entirely.

But fifty people can decide to go and rob a bank. One of them is two miles away on the telephone tipping off the guys as to what's going on there. He is not actually there at the bank, but he knows what is going to take place and he is a participant in it. He is as much guilty of robbing the bank as the fellow that actually puts the explosive to the door of the safe. And if there is a hunk

of dough that was gotten away with, just because he doesn't possess it, he is on the telephone, does that mean that he didn't have anything to do with getting that money?

Let me tell you, under certain circumstances, under certain statutes, the fact that he is on the telephone and these fellows are over there at the bank, and a bank guard comes along and says, "What are you guys doing here?" And somebody shoots and kills him, that fellow on the telephone may be held for murder under certain circumstances, the emphasis being on whether he knew a crime was going to be committed and he was a willing member of it. And all the consequences that follow in connection with the execution of that plan, and all that's done in furtherance of that plan, whether he knew every step or most of the steps or not, are the same as though he actually did those steps himself.

He put the explosives there, and he took the money out physically with his own hands. And so the test isn't whether or not in connection with a substantive count the particular defendant you are considering actually had that hunk of drugs in his possession, physical possession. Did he know?

First, you found him, if you have, guilty of conspiracy, and a co-conspirator has that small amount or a large amount of drugs in his possession, but the defendant

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that you're considering did not have it in his possession, but these elements that I have told you with respect to substantive counts you are satisfied beyond a reasonable doubt then both of them are equally guilty of the substantive count considered even though one of them did not actually have the drug in his possession.

What do you say, Mrs. SAunders, am I getting through?

JUROR #2: Yes.

THE COURT: Doesn't that make common sense, for heavens sake? Should the test be whose actually got it in his possession or should the test be what did the guy know was going on, and did he participate?

You have got to be satisfied, of course, beyond a reasonable doubt, that he knew that what is charged in the substantive count was going on and he was a willing participant and intended to commit that particular substantive count.

The test is not whether he actually had the drug in his own physical possession.

All right, I will have satisfied myself completely if I then go back to the language which is far superior to my own on this element that you have inquired about, and then I will feel satisfied I have done everything I should under the circumstances.

Counts 2, 3 and 4 of the indictment charge Joseph Magnano, also known as "Joe the Grind," Frank Pallata, also known as "Bolot," also known as "Nose," Richard Bolella, and five others who are not on trial, with the substantive offense of distribution of heroin and possession with intent to distribute heroin.

There is another way that you may find these defendants guilty of these three substantive counts besides under the principles I have just given you relating to aiding and abetting. You remember what I told you yesterday about aiding and abetting?

If you find that a conspiracy to distribute heroin existed, that these three defendants were members of it, and that the offenses charged in Counts 2, 3, and 4 were actually committed by another member of the same conspiracy in furtherance of the overall plan, you may find these three defendants guilty of these substantive offenses even if they were not physically present at the time that the offenses were committed.

In other words, if you find beyond a reasonable doubt that the persons identified as "Skooch" and "Charlie" were members of a conspiracy to distribute or sell heroin along with Magnano, Pallatta and Bolella, you may find Magnano, Pallatta and Bolella guilty of these three counts

if you determine that Skooch or Charlie physically distributed the heroin in furtherance of the conspiracy.

The same principle applies with respect to Count 9. This count charges the defendant Soldano and another person who is not on trial, Joseph Malizia, with distributing and possessing with intent to distribute three kilograms of heroin.

You will recall that government witness Verzino testified that Soldano sold him this heroin and that the actual delivery took place in Queens, New York. Queens, New York is not in the Southern District of New York.

You may find Soldano guilty of this charge, however, if you find beyond a reasonable doubt that he was part of the conspiracy to distribute heroin along with Verzino and that he sold this to Verzino and that Verzino took the heroin to the Southern District of New York, which includes Manhattan and the Bronx, with the intention of distributing it.

In other words, if you find that Soldano was a member of the conspiracy charged along with Verzino, that he gave the heroin to Verzino, and then that Verzino took it into the Southern District of New York with the intention of distributing it, you may find Soldano guilty of Count 9.

Now, let me double check your notes.

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I think I have complied with all that you requested, and if you find after you go back there that you want something more, or you want me to repeat some of this, or take on something new, I tell you you will not be doing your full duty if you say "Let's not bother the Judge."

That's what I'm here for, and that's what these lawyers are here for. I don't talk out of both sides of my mouth. I have been charging juries for a long time, and as the Judge presiding I tell you that this is not easy for you because I know what it took me, and I have had these cases. It took me until 4 o'clock in the morning of the very day that I delivered the charge to be mighty sure I tailor made this charge for this case.

Such are my limitations. So if I found it difficult, what is more natural than that you should find it difficult. But when I came here I didn't have any more difficulty, I had resolved it, and I was ready with my charge. Likewise with you, I want you to do it with that same thoroughness, as I know you will, before you come to deliver your verdict.

Have a good lunch, and we are waiting. I am up in chambers. There are other things I'll be doing. You are not holding me here. Send your notes in. Don't hesitate. I would feel terribly disappointed if you hesitated.

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I don't want you to send notes in without thinking what you're doing, and I know you won't do that, but if you want anything that we can do for you we are here to serve you and to help you.

That's it.

All rise.

(Jury excused.)

(In open court - jury not present.)

THE COURT: The Court affords counsel any opportunity they wish with respect to what has transpired up to this moment today in open court.

MR. J. PANZER: If your Honor please, first, I believe I sent a note to your Honor, and I request that your Honor mark that as Defendant DeLutro's request.

Your Honor has charged the jury --

THE COURT: I don't know anything about a note. Let's get that settled.

MR. J. PANZER: Mr. Edsel gave you a note that I sent on a yellow piece of paper.

THE COURT: I see it. You say a note while I was charging the jury?

MR. J. PANZER: Before your Honor --

THE COURT: No one is putting anything over on you, Mr. Panzer, wait a second.

Now I know what you're talking about, and I am looking at it for the first time.

Now just listen to it.

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THE COURT: This says, "In answer to question by jury your Honor mentioned what evidence is there against him. You did not mention what evidence is there for him."

And it is signed "Joseph Panzer, Attorney for DeLutro."

Go ahead.

MR. J. PANZER: I request that your Honor should so charge the jury as I requested in my note.

THE COURT: That is it?

MR. J. PANZER: That is No. 1.

I object to the portion of the charge to the jury that after an overt act is committed and the object of the conspiracy is not carried out, nevertheless, the crime of conspiracy has been committed. I object to that portion of the charge.

THE COURT: What do you say? Repeat that again, please.

MR. J. PANZER: Your Honor said that after a conspiracy has been entered into and an overt act has been committed in furtherance of the conspiracy, but the object of the conspiracy has not been carried out, in other words, to use your Honor's own example, that after A and B decide to rob a bank and A made a telephone call to the bank to find out as to how late the bank is open, but after

that telephone call both A and B said, "Forget about it; we don't want to rob the bank." Nevertheless, your Honor said the crime of conspiracy has been committed.

THE COURT: I see your point. You take objection to that?

MR. J. PANZER: I take exception to that.

THE COURT: Noted.

MR. J. PANZER: I object to the statement that if there was a written paper to establish the conspiracy, even there we would need a jury to determine whether the evidence rose to the level of proof beyond a reasonable doubt.

THE COURT: Yes.

MR. J. PANZER: No. 3, I object to the charge that membership in a conspiracy should be determined from all the evidence in the case and request that DeLutro's request No. 14 be given to the jury.

THE COURT: The Court will do nothing about anyone of your statements. It is quite clear that you were not listening with the greatest of care to what I actually said, but the record reflects how you feel and what your grievances are. Let us go on.

What do you want, Mr. Epstein?

MR.EPSTEIN: I have two exceptions to your

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Honor's remarks this morning, one concerning your Honor's instruction as to the doctrine of actual or constructive possession. I take exception to the Court's remarks in that regard.

I don't feel that your Honor should have charged on the doctrine of constructive possession. I don't think your Honor sets forth the parameters of what constructive possession is.

THE COURT: You feel I should add constructive possession?

MR. EPSTEIN: I feel you should have deleted it, and I so requested it of your Honor yesterday.

THE COURT: What else?

MR. EPSTEIN: I also take objection to your Honor's charge as to Pinkerton. Your Honor should have instructed as I set forth in my request.

You repeat what you said yesterday with the same force and effect.

MR. HOFFMAN: I join in those exceptions on behalf of Mr. Lucas, your Honor's instruction that the determination of whether or not an individual is part of a conspiracy should be made on the totality of the evidence. That is not the law and I except to that.

THE COURT: Mr. Chance, your hand is up?

MR. CHANCE: I would like to join in the exceptions for the record as proposed by the other attorneys.

THE COURT: Yes, and I take it that any objection taken by one is applicable to anyone else, that it has the same force and effect as though everyone actually got up and repeated it.

Now, gentlemen, let me just say this for whatever it means to you, as to those portions of the charge, including the conspiracy, and including the very items that you have addressed your remarks to, let me say as to those, I did not have to labor the other night; they came from my own and other Judges' charges, which I have used over and over and over again. They have gone up to the Court of Appeals and have been afrirmed. So all I did with regard to those portions to which you have taken some exception are not of my own creation, but are taken from the law which I used over and over and over again, word for word as uttered before this jury. They have gone up to the Court of Appeals repeatedly without fault finding. I am not claiming authorship. I told you I did not create that verbiage. I borrowed for the purpose of the charge. And all I did with regard to this charge on this particular issue of what is a conspiracy was to take from the language used on conspiracy over and

over again in the years gone by. Some of those cases have gone up to the Circuit Court of Appeals, and since they were not in any way interfered with, that, to me, is approval. Otherwise, how do you know whether you are on the right track or not? You know it by seeing what the High Court has done when you charge with regard to an identical situation in another case. This is not the first conspiracy case I have tried with regard to the possession and distribution of narcotic drugs. It is a very common, garden variety type case on the calendar. I throw that out not to set you back, but to have you reflect on whether or not you want me to add anything else or to reassure you that you need not worry on that score. But you do anything you want.

Remember, I did not create the language, and I confess it, but borrowed it from greater minds than mine.

Gentlemen, let's go to lunch.

(Luncheon recess.)

(In open court - jury not present.)

THE COURT: It is now 6 o'clock. I want you to know that I received a note about ten minutes ago from the jury saying that they plan to go to dinner, and they have fixed the hour at 7 o'clock, so, gentlemen, members, rather, of the bar, counsel on both sides, you are excused until 8:30. That's the best I can do. The jury will return to continue their deliberations, and I'm quite sure I shall not hold them beyond 10:45 or 11 o'clock at the latest, but they will go to dinner and they will return and they will continue with their deliberations.

Make your plans accordingly.

xxx (Note marked Court's Exhibit 9.)

(In the robing room - present, Mrs. McDaid.)

(Discussion off the record.)

(In open court - 10:25 p.m.)

THE COURT: Let the record show that after I made the announcement to counsel around 6 o'clock, in the light of how things stood at that time, that they leave the courtroom and return at 8:30, the jury sent in a note calling for a vast amount of transcript.

I left directions that as soon as counsel returned they should see Court's Exhibit 10 for identification, which is vast in its requests for material from the transcript.

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Since that time we have received 11 for identification, 12 for identification, 13 and 14, all Court's exhibits, and without taking more time, let me say that almost every one of them deals with the reading of the transcript.

The difficulty arises in fact that none of these requests pinpoint the material sought to be read with exactitude. It is on broad lines. We don't quarrel with what the jury wants. I am emphasizing the dreadful challenge to all of us to dig up what should be served to the jury.

I pointed out to counsel, whether they agree or not is of small concern to me at the moment, that all these notes are eloquent testimony of a devotion and a sense of dedication by the jury in its search for the truth that we can all profit by. It is truly exemplary. I told him very distinctly that I did not intend to discourage a continuance, even at this late hour, of the jury's search for the truth.

We may have to labor, and there may be all kinds of inconveniences, but that's little enough when we think of the magnificent concern by the jury in its attempt to fulfil the plea by the Court that they address themselves, and every it of themselves, to this vital task.

I have no hesitancy in saying though this is a troublesome case from the point of view of the immense amount

of detail that was revealed, and to ask the jury to recall this, that and the other, after sitting for five weeks, and sometimes not even mentioning to the jury what they should recall, because it was not pinpointed for one reason or another during the summation --

The record will reveal the emphasis was on Perna and Verzino and so many other areas in the total record were left hanging and not bound together.

All of that makes me feel that we have a terrific challenge, but we will meet it. We are all determined to meet it.

I talked with counsel in the hope that we may be able somehow to figure out just what it is that we could give the jury and feel satisfied in our own consciences, but there are too many areas of disputes understandably, and so unless I hear a good and substantial reason, and I am laying all this as a foundation for this question, unless I hear a good and substantial reason I think the better part of wisdom would dictate that we allow the jury to hear in its entirey the testimony of Perna and Verzino, and that's just a part of all that they ask.

There is other testimony, one dealing with Vasquez's testimony about John Gwynn, another which I want to call your attention to that I received while you were trying

to help figure out how we could meet this, deals with William Chapman: "May we please see or have read Mario Perna's testimony, both direct and cross, relating specifically to William Chapman. Thank you."

It is almost -- it stirs one deeply that on one of these notes, 10 for identification, the jury might receive this material after the dinner break.

P.S., on 12,"Is there a safe place for keeping our working papers for safekeeping overnight?"

That's it.

And so I am inclined to get started in the fashion that I have indicated, unless I hear from you to the contrary.

I see and hear nothing. I can understand why counsel can offer nothing. You can't really offer anything because of the reasons I have in my own hesitating fashion tried to make clear, so bring in the jury and let's get started with some part tonight, and finish as much as we can tomorrow.

Bring in the jury.

(Jury present - 10:30 p.m.)

THE COURT: Ladies and gentlemen of the jury, I have had occasion in the past to tell you the impact on all of us of your concern with your undertaking, and one of the

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...st eloquent pieces of evidence of that spirit is what's happened in the last few hours.

You sent in notes asking for material to be read to you, and there are many phases you wanted enlightenment on.

There is a vast difference between these two examples, the jury asking for a specific conversation, a jury asking for the testimony with regard to a particular object introduced in evidence, a jury asking for all the testimony relating to exhibit such and such, and the second instance of a jury asking for what was testified to on a general subject of dealings with a named defendant.

And so that was bound to cause a great deal of concern as to how we respond to your request, and respond properly, and how we could match your zeal and how we could give you what you are entitled to.

We have decided that it is almost impossible to dig out one portion, because it is so vast, and another portion equaling that, and the only way to do it would be to read the entire testimony.

And so there is going to be read to you in its entirey, the testimony of Perna and the testimony of Verzino, and I think that's the only way, and so do the attorneys on both sides, we believe that's the only way we can fulfil our

obligation to you.

It caused a great deal of discussion, and, remember, not a moment did anyone indicate that this was a liberty, or that you weren't entitled to it, and that we shouldn't serve you. The issue is how we can best serve you, and that's our answer.

We don't want to sit and listen to pages. We would like to cut it down if we were looking for our own self-interest. But we say, no, give them the whole thing, because it is impossible to delineate. By the time you get this and you get that you still feel uncertain they are getting everything they want, so you might as well let them hear the entire testimony.

I think that will give you an answer to almost all -- it will as to everything on those two witnesses.

We received your last note just a few minutes ago:

"With the Court's permission we ask to recess for the night. The balance of our deliberation will be done when we review the material requested of your Honor. We shall be prepared to hear that material promptly at 10 a.m., and then move forward to the last phase of our mission. Thank you."

And I thank you for the tence of your note.

It is now 10:37. You have shown wisdom before

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when you had a chance to speak up and it best we can do is listen to you, and so that's exactly what we will do.

You will be taken home, and I remind you that I am just as tired as the rest of you, but I must remind you that what I said about not talking to anybody and not letting anybody talk to you, and if anybody does, you report it to me.

I know tomorrow morning you will come here and you will go right to your jury room, and you will return at 10 o'clock and enter upon your deliberations and the first thing we will do promptly at 10 o'clock is start to read the testimony.

And don't forget this: After you leave I am giving a direction to the attorneys, and I am staying here with them, that the balance of your request be prepared and agreed upon so that there will be no further delay with regard to that tomorrow. You are not going to be kept waiting. Everything you have asked for is going to be served up to you straight down the line. That's the least we can do to pay our respects to what prompts you to send us all these notes. It is not being sent here because you want to stay as long as you can on the jury. You have worked night after night. You have put in heavy hours. You are here because your conscience and oath surcharges you and won't let you

alone until you have done what you think your conscience and your oath deamnds, and bless you for that.

Good night, ladies and gentlemen.

(Jury excused.)

THE COURT: Marshal, take the jury, see that they enter the cars, see that no one talks to them, take them right down now and let them be on their way.

(Jury excused at 10:40 p.m.)

THE COURT: Gentlemen -- I mean counsel on both sides, we will take up 10 for identification.

"May we have read to us or hear:

"1. Mario Perna's testimony regarding defendants Magnano, Pallatta, and others, involving two kilos of heroin in March, 1973.

"2. Perna's testimony involving four kilos of heroin in March, 1973.

"3. Perna's testimony involving twelve kilos of heroin in November 1973."

That's all on Perna.

On Court's Exhibit 10 for identification -- I will come back to it again because it deals with other testimony; or other material.

Let's go now to Court's Exhibit 11 for identification.

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"1. Testimony, direct and cross, specifically pertaining to Perna and Verzino as they recalled dealings with defendant Soldano.

"Cocaine. Specifically relating to defendant Gwynn. Was that stipulated or can we see it or was there testimony on that point by agents?"

We will come back to that note dealing with cocaine. But it is quite evident that the first part of Court's Exhibit 11 for identification deals with Perna and Verzino's testimony.

Then we go to 12 for identification, which makes no request for material, but just says something about recess for the night at 11 p.m., and then return tomorrow morning.

13 for identification:

"May we hear Mario Perna's testimony concerning his meetings with the defendant DeLutro, specifically when those meetings occurred."

Court's Exhibit 14 for identification:

"May we please see or hear or have read Marios Perna's testimony, both direct and cross, relating specifically to William Chapman?"

Mr. Clerk, was this the last note?

THE CLERK: Yes, your Honor.

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THE COURT: Will you mark it 15, please?

(Court's exhibit 15 marked.)

THE COURT: 15 for identification asks for no material.

As I go over it I can see the wisdom that you demonstrated, along with the rest of us, that the entire testimony of Perna and Verzino must be read.

Then we go back to 10 for identification, and of course everytime I say this, I mean Court's exhibits.

"Number 4: Tape of Cunningham. Conversation with Anthony Verzino."

Speak to that, Mr. Amorosa.

MR. AMOROSA: Judge, of course the tape is not in evidence, but as we will be reading all of Verzino's testimony, which includes references to that conversation with Cunningham, I would think that everybody would be satisfied as long as we are reading all of Verzino's testimony, direct, cross, redirect, recross.

THE COURT: What do counsel for the defense say with regard to that item?

MR. GOLDBERG: We agree with Mr. Amorosa.

THE COURT: Thank you.

Item 5 of Court's Exhibit 10 for identification:

"Vasquez's testimony about John Gwynn, and doing

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business with Gwynn."

What does the government say?

MR. AMOROSA: That all of Vasquez's testimony should be read, both direct and cross, your Honor, as it is exclusively devoted to his relationship with John Gwynn.

THE COURT: What do counsel say?

MR. LANG: I agree, your Honor.

THE COURT: Thank you, Mr. Lang.

THE COURT: Now we come to Court's Exhibit 11 for identification, that second item:

"Cocaine, specifically relating to defendant Gwynn. Was that stipulated?"

MR. VIRELLA: Yes, your Honor, on page 1771 of the record. There is also testimony by Peterson and Simpson and cocaine is available to them if it is directed that it should be given to them, your Honor.

THE COURT: What's that?

MR. VIRELLA: There is a third request that they could see the cocaine, I believe, in that request. We have the cocaine in our offices.

THE COURT: I see. All right. What do counsel for the defense say with regard to that item dealing with cocaine?

MR. LANG: I agree with the stipulation on the

pages and the agents' testimony, whatever pages there are.

THE COURT: Then you agree with what the government's representative just said?

MR. LANG: Yes.

THE COURT: Thank you, Mr. Lang.

Now we come to 13, Court's Exhibit 13 for identification:

"May we hear Mario Perna's testimony" -- well we have already dealt with that, dealing with DeLutro.

I think that sums it up, and with your help we have brought it down to a manageable situation. We know exactly what we are after.

Will there be any reason to hold anyone here tonight in order to fulfil everything that we have agreed on since the jury left us about ten minutes ago?

MR. AMOROSA: Judge, I don't believe so, as we will be --

THE COURT: I don't want any "I don't believe so." I want you to say "I know so."

MR. AMOROSA: I know so, as we will be reading everything to the jury tomorrow.

THE COURT: What about the cocaine? They want to look at it.

MR. AMOROSA: I don't think the jury wants to

look at it. I think they want to know whether it was stipulated and we can tell the jury "Yes, it was stipulated as to cocaine," and give them the page references if they would like.

THE COURT: All right.

How long will it take you to get the cocaine if they want it?

MR. AMOROSA: Tomorrow morning, Judge, we will have it here at --

THE COURT: How long would it take you to go -- is there any reason you can't bring it here tomorrow morning?

MR. AMOROSA: No.

THE COURT: Then just say I will bring it in case the jury wants it.

MR. AMOROSA: Yes, sir.

THE COURT: They have a right to see it on top of the stipulation.

Very well then. You have got heads, you have got minds, as much as the next person. You have a duty as much as the Judge. Don't leave here, don't you dare leave here -- it is ten to 11 -- without satisfying yourselves on what the Court has directed will be done.

And don't give me a snow job, which means give me your pleasantry and not carry out what I want accomplished.

I will not hold up this jury any longer. I don't care what inconvenience there is to you. It is no more than the inconvenience to the rest of us. I don't want to be unfair and say that that's true of everybody, but I would be false if I didn't say that not everyone is that deeply concerned with the way the Judge wants it done, but the Judge happens to be here and that's the way it is going to be done.

Do you understand that, Mr. Government's Representative?

MR. AMOROSA: Yes, sir, we do.

THE COURT: And do you understand it all counsel?

MR. GOLDBERG: We do, your Honor.

MR. LANG: Yes, sir.

THE COURT: Does anybody have any doubt about it? What do you want to say, sir?

MR. CHANCE: If your Honor please, I would say pursuant to your suggestion at the beginning of this trial that each counsel be furnished with a copy of the transcript that I did furnish each counsel here a copy of the original transcript to be copied and I understand that they so copied.

THE COURT: Very well. Is there anything anyone else wants to say to the Court?

Announce an adjournment, Mr. Clerk, until 10

o'clock tomorrow morning.

(In open court - Mr. Hoffman and Defendant Lucas present. 11 p.m.)

THE COURT: Mr. Lucas, your attorney has been on the verge of pestering me with regard to your receiving medical treatment. There is a limit to the amount of time that a Judge can devote to this kind of problem.

I have given a direction from the very beginning that you go to be treated.

Almost everyone on my staff has been pleaded to by your lawyer. He talks about you, and your medical problem. There's got to be an end to that. People have problems to solve in connection with the case. The Marshal doesn't know whether to talk, not to talk. You have a right to be here when the testimony is read to the jury tomorrow. You heard what I did. You're smart enough to know what I said to the jury before they left a half hour ago, that all the testimony will be read to them that Perna and Verzino gave from this witness stand. You understood that, didn't you?

DEFENDANT LUCAS: Yes, sir, I did.

THE COURT: You have a right to be here, and should be here. It is vital to your interests. If you say to me "Judge, I am in pain and I ought to go and have my pain subsided by medical attention," I say that's your choice, and

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if you want to go I'm directing that you be treated. You can't go there and also be here. You will have to make up your mind which you want.

DEFENDANT LUCAS: Sir -- I'm sorry.

THE COURT: It's all right. I'm finished.

DEFENDANT LUCAS: I believe I can do both.

THE COURT: How?

DEFENDANT LUCAS: Because Mr. Juliano indicated to me the doctor said he would take me as soon as possible, he would take me any time. If he can get out early to go there in the morning, like 8 o'clock, I can be back here by that time.

THE COURT: I don't know. The marshal will have to answer that. I don't know their schedules. What do you say, Marshal?

MARSHAL: That isn't a firm time, either. It's an approximate time, your Honor, so I can't guarantee it.

THE COURT: All right.

Now, assume that you find that you cannot be taken care of as early as you think. Do you still want to go?

DEFENDANT LUCAS: If I can't be taken care of as early as I think, I won't go.

THE COURT: So he says if he can't be taken care of before 10 o'clock tomorrow morning, he won't go, because

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he wants to be here to hear the testimony, so it is very simple.

You will have to say that the Judge would like very much and asks that they go out of their way to see that he gets medical treatment and try to see if you can't get to it. Will you do that for me?

MARSHAL: If possible.

THE COURT: How soon tomorrow morning?

MARSHAL: I will place a call tomorrow morning tc --

THE COURT: What time will you place the call?

MAFSHAL: 7:30, 8 o'clock.

THE COURT: Getting it from you that's enough for me. If you find you can do it that early, get him over there so he can be back there at 10 o'clock, will you do it?

MARSHAL: I certainly will.

THE COURT: And if you find you can't, he himself says he doesn't want it.

MARSHAL: I will place a call at 8 o'clock or 7:30 and speak to the doctor, and if he can do it, great. If not, he will have to stay.

THE COURT: That's it. You understand it? I want that doctor to be told I would appreciate if he would take this man, help him, so he can be back in the courtroom at 10

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o'clock.

MARSHAL: I certainly will.

THE COURT: What is it, Mr. Lucas?

DEFENDANT LUCAS: One thing.

I have asked Mr. Hoffman, the marhsal, and everybody in the world I can think about to try to get some treatment here. It is not only the treatment here. My hand has had an infection and I need an operation, Judge. I have been trying to get it for God knows how long.

THE COURT: We are talking about tomorrow. You know I have shown concern from the very beginning. No matter how much the presumption of innocence is in your favor and you are entitled to be treated like anyone else. You need medical attention. I want you to have it. You heard me say so.

DEFENDANT LUCAS: Yes, sir.

THE COURT: The operation will not be able to be done tomorrow, will it?

DEFENDANT LUCAS: No.

THE COURT: We are talking about tomorrow. Tomorrow may be the day of the verdict here.

DEFENDANT LUCAS: Yes, sir.

All I was going to ask you, as soon as this trial is over, one way or the other, would you please direct

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me to go to the hospital to get the hand fixed? This thing is a mess. As soon as the trial is over.

THE COURT: I tell you, when the trial is over regardless of the verdict -- did you hear me?

DEFENDANT LUCAS: Yes, sir.

THE COURT: I will do exactly what you ask.

DEFENDANT LUCAS: Thank you, your Honor.

THE COURT: Regardless of the verdict.

DEFENDANT LUCAS: Thank you, sir.

THE COURT: Whether you're guilty or not guilty as found by the jury, I will see that the doctors are asked while you are confined, to make a re-examination and see whether or not that operation should be much more immediate than what they indicated to me a few weeks ago.

DEFENDANT LUCAS: Yes, sir. They don't know how it feels. I know how it feels, Judge.

THE COURT: All right. So I will ask them to re-examine you, and will direct that they re-examine you, and I will ask them to call in an additional man, if possible, to be sure they know what they're doing.

DEFENDANT LUCAS: Thank you, sir.

THE COURT: More than that, I can't do.

DEFENDANT LUCAS: Thank you sir.

THE COURT: You understand now?

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DEFENDANT LUCAS: I understand.

THE COURT: And you understand, Marshal, he is to be here at 10 o'clock because he wants to be here at 10 o'clock.

Thank you again.

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UNITED STATES OF AMERICA

v. 75 Cr. 687

JOSEPH MAGNANO, et al.

October 24, 1975
10 a.m.

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(In open court - jury present.)

THE COURT: Good morning.

Thank you so much for coming on time. I appreciate it.

Mr. Goldberg has been good enough to consent to helping the Court and the jury, and all of us, by reading the answers so that you won't have the monotony of the same person saying "question, answer, question, answer," and so the questions will be put by the prosecutor and the answers will be given by Mr. Goldberg, and they will represent the questions actually put, and the answers actually given by the witness.

Very well, Mr. Goldberg, won't you come up here?

MR. AMOROSA: Your Honor, I believe the court reporter will put the questions.

THE COURT: What do you mean, "you believe"? If I want to order you to do it you will do it. You've got a transcript here. It's all there, it's all been typed up and no one can find it faster than you. You were the one who put

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the questions, right? Let's try it out your way.

(During the reading.)

MR. AMOROSA: Your Honor, may we approach the bench?

THE COURT: That's strange. This is during the reading of the transcript.

MR. AMOROSA: I know, but it is important.

THE COURT: All right. Take the jury, Mr. Clerk.

(Jury excused.)

(In open court - jury not present.)

THE COURT: Will you have the record show it is now 11:12.

Yes, Mr. Amorosa.

MR. AMOROSA: Your Honor, while the testimony was being read Mr. Lucas is here shaking his head as if indicating that Mr. Perna is lying. Mr. Lucas had an opportunity to take the witness stand in this case. He does not have to relate to the jury at this time --

THE COURT: Don't give me an argument. Just tell me what you saw. You don't have to tell the Judge if he wants to say anything he should have taken the stand and all that stuff. You are interrupting the transcript because you saw him shaking his head, is that right?

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MR. AMOROSA: Yes, sir.

THE COURT: Is there anything else?

MR. AMOROSA: I am also concerned that behind me someone is talking and I can overhear what's being said myself.

THE COURT: Who is that somebody?

MR. AMOROSA: I have no idea who was talking. I turned around several times. It must have been Mr. Panzer. I couldn't see. I can overhear what he is saying and I believe the jury may be able to overhear, also.

THE COURT: Lucas, you sit there and don't go through any motions. Did you hear me? Did you?

DEFENDANT LUCAS: Yes, sir.

THE COURT: Sit down.

I may have to call that to the attention of the jury, and comment on it, Mr. Hoffman.

MR. HOFFMAN: Yes, sir. I would respectfully request that your Honor not do that. I don't think it in any way -- if it happened --

THE COURT: I am going to, because I don't think that's clean, proper behavior.

MR. HOFFMAN: If I might, your Honor, Mr. Lucas is sort of sittig way back here and I doubt if any juror saw him and to do that I think is prejudicial.

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THE COURT: Mr. Amorosa saw him and that's enough. What else?

MR. AMOROSA: I would like to clear the record up. I said I believe it may have been Mr. Panzer. I was referring to Mr. Joseph Panzer, not Mr. Ed Panzer.

THE COURT: Mr. Joseph Panzer has a voice that carries. He can't help it any more than I can help it. Watch it though, Mr. Panzer.

MR. J. PANZER: I will, Judge.

THE COURT: Just write out a note or whatever you want to.

We are going to take a few minutes recess, and, Mr. Goldberg, I am very much obliged to you, and I am going to ask Mr. Ed Panzer to relieve you and take over, so will you, Mr. Panzer, talk with the court reporters and get a general idea of the transcript, so we can go ahead the way Mr. Goldberg was able to.

Mr. Goldberg, I mean this. It is a great contribution, and I appreciate it.

MR. J. PANZER: We can take turns, if your Honor wants to.

MR. GOLDBERG: Can I be excused to go over to Judge Roberts?

THE COURT: Certainly.

(11:20 a.m.)

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(11:35 - jury in box.)

THE COURT: I neglected to tell you that while I intend to complete the reading of Perna's and Verzino's testimony, you have to decide when and if you want it stopped. If you don't want it stopped, I am going to go down the line. Sometimes the jury feels they got the answers it sought, and they indicate it. If I don't hear to the contrary, we are going right through with it.

JUROR #5: There are certain parts in there.

THE COURT: Don't make any comment.

Can we go on with the testimony or do you want to talk to the jury right now? You want to talk to them now?

JUROR #5: Yes.

THE COURT: Excuse the jury.

(Jury excused.)

THE COURT: While the jury is out of the room, I would like you all to understand that if there is any indication by a defendant while this is happening, in the presence of the jury, if there is any shaking of heads as was called to my attention before, I may have to turn to the jury and say in effect, you remember that I told you that no defendant has to offer any proof whatever, that the government must prove its case beyond a reasonable doubt; where the defendant decides not to take the stand, that cannot be

held against him but he can not substitute his testimony by shaking his head. He had his chance to do it and he chose not to take the stand.

Look out. I will say it.

All right, marshal, whenever they're ready I presume they will indicate it to you.

MR. HOFFMAN: I would like to respectfully request that if the jury indicates that point in time that they have heard a satisfactory amount of the testimony, and if at that point in time the testimony that they have heard has only been the direct examination, I would request that the cross examination on those points be read.

THE COURT: Suppose we talk about that if as and when we get to this point.

All right.

Marshal, come up a minute.

(Jury retired to the jury room at 11:38 a.m. and returned to the jury box at 11:50 a.m.)

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THE COURT: We will resume, please, with the reading of the testimony.

(The testimony was continued to be read, and during the reading at 12:45 p.m. the following took place:)

THE COURT: I asked the marshal to let us know when the lunch of the jurors arrived. We will stop now and resume at 2 o'clock.

Thank you, Mr. Panzer and Mr. Amorosa.

Mr. Epstein, will you be good enough to continue at 2 o'clock where Mr. Panzer left off?

Thanks again, Mr. Panzer.

(A luncheon recess was taken and proceedings continued again at 2 o'clock p.m. with the jury in the box.)

THE COURT: Please take your seats.

Where is Mr. Hoffman? Where is Mr. Lucas?

Marshal, where is Mr. Lucas?

THE MARSHAL: I have no idea. I was with the jury.

THE COURT: Get him. Notify your colleague. He is not here; neither is Mr. Hoffman.

(Pause.)

THE COURT: In the meantime, I will say I received,

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members of the jury, your note reading, "A question, if possible? When we reach Verzino's testimony can it be given chronologically from November, 1973 rather than at the beginning? Thank you."

My answer to that is absolutely. It begins and starts whenever you want to. It is up to you. We don't know what you have been discussing in there and we wish to satisfy you. Let me just say, as you know, the testimony of a witness is first taken on direct, such as we are now hearing from Perna, and then the next thing you remember is the cross examination of that witness. And the next thing that happens is the redirect examination of that witness, and sometimes the recross examination. But you don't have to sit and listen to all of it if you don't want it. You have to tell me. You can stop the reading of testimony any time. That is up to you. You have to decide that. We can't do that without your permission. Your request is our command.

Can I put that any better? That is it.

(Pause.)

(Mr. Hoffman and the defendant Lucas made their appearance.)

THE COURT: Why wasn't he brought here on the dot of 2 o'clock? Why should the jury be waiting for anybody?

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You know he has to be here; you have to bring him here. I am sorry. Don't look at the clock. I know what the clock says.

THE MARSHAL: Your Honor, we have no control over the elevators in the building.

THE COURT: You got to be sure he is here. The elevators work the same way when I get on them. Make arrangements and figure that out and don't give me any argument.

THE MARSHAL: Yes, your Honor.

MR. HOFFMAN: Judge --

THE COURT: I want to go on with the testimony.

MR. AMOROSA: Page 663, beginning at line 21:

(Mr. Amorosa and Mr. Epstein continued with the reading of the testimony, and at 3:47 p.m. while at page 788 the following took place:)

JUROR NO. 11: May I ask for the recess?

THE COURT: Surely.

(The jury retired to the jury room.)

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(In robing room.)

THE COURT: It is now 3:10. Counsel requested to come into the robing room. It is one of the many conferences we have had in here. They said they would like to have the court reporter take these minutes.

Go ahead, Mr. Joseph Panzer.

MR. J. PANZER: Your Honor, during the course of the reading of the minutes, Mr. Lang alerted me to look at Juror #11. I did. When I saw her she had her head all down, up to her knees, and I looked and I didn't know what to do about it, and they she raised her head and went white and right after she asked the Court for a recess.

It is my believe this juror may be ill.

THE COURT: Let's hope she's not, and I'm sure that she has the wisdom to let the Court know if she is not well.

I did not get such impression. I will agree with you that I did see a sort of whiteness at the moment she called my attention to wanting to say something, and I turned and I saw that she was white, and she said she would like to adjourn, or ask for a recess, and I immediately, as the record shows, said "Certainly."

No, I don't get that impression, and rest assured we will not push anybody who is ill, and that will not end the

case, we wil' go on, and we will wait until she gets well.

(3:17 p.m.)

THE COURT: I read into the record now, it is 3:17, a paper handed to me by the clerk, who received it from Mr. Hoffman, who I saw hand the paper to the clerk.

I noted the time that the paper was handed to the clerk, and it was 2:09.

Before I read this, the record will show that when I went out and asked "Where's Mr. Hoffman?" there was no answer, and then I asked "Where's Lucas?" and you know what ensued.

"2:05 p.m.," reads this paper, to which I have just referred. "24 October 1975, Honorable Sir:

"I am covering for Mr. Hoffman, with Mr. Lucas' consent. I respectfully ask for the withdrawal of a juror and the declaration of a mistrial in Mr. Lucas' behalf. I believe your statement to the marshals in the presence of the jury unfortunately reflected upon Mr. Lucas' incarcerated position. Respectfully, Robert Blossner."

The record will show that Mr. Hoffman came in, as I noticed, at 2:07.

Now, this precipitates what I intended to say to the jury and have said on other occasions where a similar occasion arose, to wit, where the jury was made aware that

the defendant was incarcerated.

The close quarters of this courtroom, with the unfortunate situation where counsel are squeezed -- and I think the record will show that I have deplored that, that they almost have to sit on top of the client and the client almost on top of the lawyer -- and the lack of facilities of lawyers to confer with one another in the event they find it necessary while the jury is present, is a sort of humiliating position for all concerned to see how the lawyers have to huddle together and keep their voices down because of the limitations of space.

But the limitations of space in the courtroom are the result of the limitations of courtrooms, and I think I have informed counsel that I asked the Chief Judge of the court long before we were assigned to this particular courtroom what the challenges would be in this case, the enormity of the issues that would be involved, and the problems that would be presented, and I am convinced that the Chief Judge did everything humanly possible to accommodate me, recognizing that the larger courtrooms are actually in use, and their usage is for as important an undertaking as what went on before me.

But such as it is, these close quarters make it almost impossible for the jury to fail to see what's going on,

and one of the things is to see Mr. Lucas, or any other defendant, get up in the course of testimony to go to the bathroom, and everytime the defendant gets up there goes the marshals in and out of the room with Mr. Lucas.

That is true of other defendants in other cases. It is extremely difficult. I have never asked the marshals to put their badges on, and they didn't have them in this case, but it is simply senseless to think that a jury cannot deduct -- especially after all these weeks -- that the defendant is incarcerated, and I think that it behooves the Judge on his own to call to the attention of the jury the fact that "You may have observed that there are marshals with some defendants, and I want you to know what that means. It has nothing whatever to do with guilt, it is only with respect to the inability to post bail.

"Do you mean to say, ladies and gentlemen of the jury, the presumption of innocence should be in favor of a defendant who can come in because he has the wherewithall and walk out pending his trial and not be detained for five minutes, that that presumption is in his favor even though he may be one of the leading racketeers of the world, but it is not in favor of the defendant who hasn't got the wherewithall to post bail?"

I think that ought to be made clear to them, that

they cannot draw any inferences whatever from the fact that a defendant is in the custody of marshals, none whatever, and I think it behooves the Judge to emphasize that, and emphasize the presumption without waiting for any motion.

I am ready to do so before this jury today or before they come in with a verdict. I am ready to say, in essence, what I have just indicated, and I welcome the reactions of counsel to what I have just said.

MR. BLOSSNER: If I may just complete the record, I wish to inform the Court that prior to the Court coming into the courtroom I informed Mr. Boman that Mr. Lucas had not been proceeded and he told me he wasn't aware of it.

THE COURT: Then why didn't you get up when the Court asked "Where is Mr. Hoffman?" You remained silent and the record will show that. You had an obligation to Mr. Hoffman to stand up and say "I am here to represent Mr. Hoffman, your Honor." You said nothing. You remained silent.

MR. BLOSSNER: The record will also reflect that I did attempt to rise, and you told me to sit down and put it into a written form.

THE COURT: That had nothing at all to do with what I'm just saying. I know what you did. You got up after the episode I'm just talking about, is that not so?

MR. BLOSSNER: That's correct, your Honor.

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THE COURT: All right. So why don't you face reality. You did not announce a thing when I said, "Where is Mr. Hoffman?" There was complete silence. That's when you should have stood up and said, "Sir, I am here according to Mr. Hoffman's request, to represent the defendant Lucas until Mr. Hoffman arrives."

You said nothing.

MR. EPSTEIN: Excuse me, your Honor. With regard to the proposed instruction you intend to give --

MR. HOFFMAN: Can I comment on that, because it is my client?

THE COURT: Yes.

MR.HOFFMAN: As to that, my fear in that instruc= tion is the following, and I would oppose the instruction for the following reasons:

Part of the defense in the Lucas case was twofold.

One, it was to show that Mr. Lucas had legitimate businesses that generated large sums of money and that were worth substantial sums of money. To combat in part the state- ments made by Perna that the reason Lucas didn't have the illegitimate money necessary to pay was because he had put illegitimate money into these businesses.

Also, I think it is obvious that in my summation I called upon that evidence or reflected upon it to the jury

o show that Mr. Lucas has available to him large sums of legitimate money and large sums of legitimate credit from legitimate banks in the hope of showing the jury that if he happens to have large sums of money around, although it was improper to keep it in cash, it didn't come from narcotics.

Now, to tell this jury that Mr. Lucas is in jail because he doesn't have the wherewithall to post bail runs one of the following dangers:

It either tells them through innuendo the bail is so high, so tremendous, way above the figures we are talking about in this case, four or five hundred thousand dollars. From that I fear they would conclude that Mr. Lucas is such a danger to the community that the Court held him in God knows what figure of bail.

Or, on the other hand, additionally, and/or they may conclude that the testimony adduced by Mr. Lucas' witnesses is false in some way and they don't have these businesses or these legitimate funds available to him which he certainly could have used in part or in whole to put up bail.

So I fear that that kind of instruction in this case, as to Mr. Lucas, would be very prejudicial, and I would be opposed to it. I think it makes the situation even worse, although I thank Mr. Blossner for the motion and certainly concur in it.

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THE COURT: I am going to do something about the motion. I wanted to do it on my own without the motion, and you still press the motion and say, "Judge, don't do anything."

Make up your mind, do you withdraw it or insist upon it?

MR. HOFFMAN: I press the motion, but I think what your Honor is suggesting to do --

THE COURT: What do you suggest I do?

MR. HOFFMAN: Grant a mistrial.

MR. J. PANZER: I'm for that.

MR. AMOROSA: May I be heard?

THE COURT: Certainly.

MR. AMOROSA: First, Lucas is not on any bail in custody. He is custody because he violated -- he has a parole violation in New Jersey and he is currently serving a sentence which expires in a year and a half for possession.

MR. HOFFMAN: For the record, it is a probation violation.

MR. AMOROSA: There is no bail on which Mr. Lucas is currently detained.

Secondly, the fact Mr. Lucas is or was in custody was already brought out on this trial. I asked the witness Rosenberg, "Do you know Frank Lucas?" His answer should have been yes or no. He turned around and gratuitously threw out,

"I met him in the city jail."

Therefore, as it is already in the record that Mr. Lucas is detained, we suggest that no instruction be given to the jury. Also, we agree with Mr. Hoffman. Of course, we oppose the motion for a mistrial because it's already come out before the jury due to Mr. Rosenberg's gratuitous statement in the record on cross examination.

THE COURT: I understand what you have just said. Is there anything else you want to add?

MR. AMOROSA: No, sir.

THE COURT: Anything else?

MR. HOFFMAN: Just two other factors.

One is that, as I remember Mr. Rosenberg's testimony, and I don't remember it word for word, but as I remember it, he didn't put a time on when he met Mr. Lucas in his testimony, and there was testimony, general, earlier in the case unfortunately that Mr. Lucas was in jail, the result of a previous case, just about the time Mr. Rosenberg testified he was in the same jail originally meeting Mr. Perna.

The jury is not aware itself as of this time thathe met him in jail.

The second point is that the marshals have been extremely cooperative throughout the trial. What they have done is allowed Mr. Lucas to come into the courtroom always on

his own, without escorting him in, and one marshal would come in through the back and sit in back of Mr. Lucas out of the jury's presence with the bench obstructing them.

Up until a few days ago, when for some reason -- and I don't know what it was, I don't know whether they have extra faith at this late stage of the trial, they haven't even done that. Two of them have just sat in the back of the room. There hasn't even been one sitting in back of Mr. Lucas, for whatever that is worth.

THE COURT: Anything else?

MR. HOFFMAN: No, sir.

THE COURT: Does anybody else want to say anything?

For the record, the motion is denied and I want the record to show that because of the impulse I have to talk to a jury along the lines I have indicated, and I thought it was precipitated by the motion to which I have just alluded, I did consult with colleagues of mine in this building who are wiser than I as to their practice, and that I have engaged in about talking to the jury frankly about marshals in the courtroom.

They applauded it and thought I succeeded the need to do it, and told me if instinct and logic and a sense of the trial warranted it, I should do it.

I am inclined to, and I still feel regardless of

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this motion that's what I was going to do. I am not saying that I will not do it before the jury comes in with a verdict. I want to reflect upon it.

Now, are there any other items that we can talk about now?

Very well. Thank you, gentlemen.

Is there anything else on the record?

MR. AMOROSA: WIth respect to Court's Exhibit 11, which your Honor received last night, there was one question with respect to cocaine which can be answered for the jury.

THE COUT: I don't want to be bothered with it now. I am just saying let's do it this way. I would like to have the reading completed first, and then bother with these other items. They are listening with full attentiveness.

It is, gentlemen, you must agree, almost a monotonous experience to sit there and you would think that would just make jurors almost go to sleep, but they are attentive and I hope that nothing has happened to the lady juror to whom reference was made, but I must say that we are extremely fortunate -- whatever their verdict is, we are extremely fortunate to have such a conscientious and devoted jury.

Thank you.

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(In the robing room - 3:50 p.m.)

THE COURT: Gentlemen it is now eight minutes to 4. About five minutes ago I asked the clerk of the part to go to the marshal in charge of the jury and inquire how the juror is feeling.

MR. J. PANZER: Number 11.

THE COURT: Number 11, and to tell her that I was concerned about her health, and would she please let me know how she is feeling.

The marshal had the door open while he talked with her, and so says Mr. Bowen, the clerk, and the clerk stood right there and heard something like this: "I am feeling fine. Thank Judge Cooper for his concern, but we are all remaining here," said other jurors, "because we want to deliberate, so we are here purposely, for that purpose, and not because anybody is ill, and when we feel we want to come out we will let the Judge know." But right at this time they have been speaking, have been in deliberation, and not because of the illness of anybody. And I feel assured and therefore-- and the way Mr. Bowen said, she seemed to be chipper, and so forth.

I think it was one of those temporary things human beings are subjected to.

Feeling assured about it, I think we can forget

it and let them go about their deliberative period, and when they are ready, we will just have to go out.

MR. J. PANZER: Your Honor, so far the jury has had read to them Perna's direct testimony, part of it anyway. I would respectfully request the Court that if they should say they don't want to hear anymore, most respectfully I would ask the jury whether they don't want to hear cross examination because I feel that we are hearing the direct and the Court having said before that it is a human frailty to forget after some weeks, and I heartily concur with that, that at least as a fair gesture to the defendants, the Court should at least inquire, "Would you want to hear the cross examination of Mr. Perna or Mr. Verzino?"

THE COURT: Earlier Mr. Hoffman made that kind of suggestion,and I said we would cross that bridge when we came to it. You brought it up again, and I tell you exactly what I am going to do, because it is consistent with the law. We checked into it.

You are not entitled to any such thing. Whenever the jury wants the testimony stopped, that's it. Whether they have gotten to cross or not. They are fully aware of what the divisions of a witness' testimony are, direct, cross, redirect, recross. You heard me mention it to them, and I guess you must have seen their nods of understanding.

As I understand the law, whenver the jury wants the testimony stopped, even though the very items they called for have not been touched upon, and haven't been gotten to in the re-reading, they have that right, and the Judge must abide by what the jury wishes.

When they say "Stop," that's the end of it, so I must deny your request, and Mr. Hoffman's request to the same effect.

MR. J. PANZER: Just one more point, Judge. May I be heard?

THE COURT: Yes, sir.

MR. J. PANZER: The notes that --

I am now referring to the notes that the jury sent into the court, and specifically to the request that the jury made that they wanted to hear certain portions of the testimony referring to kilos which embraced Counts 2, 3 and 4. They then asked for a reading of Count 9, skipping the Count 8, which is the count wherein DeLutro is charged.

The Court, I believe of its own motion, said, "We are going to read the whole testimony to you."

I feel that I would like to object, on the record, and ask the Court for the withdrawal of a juror and declaration of a mistrial in view of the fact that the request of the jury was not actually, specifically followed.

Of course, they then later sent in a note asking also for DeLutro's testimony. I remember the last note, and I believe that we haven't come to that, but today I understand they sent in a note asking specifically for the November Verzino testimony.

So I am asking for the withdrawal of a juror and the declaration of a mistrial only because the request of the jury wasn't specifically followed. That's it.

THE COURT: Very well.

Of course the record will reveal we had all of this before us yesterday, and that we all agreed on both sides of counsel table, with the Judge, that we were left with no alternative than to proceed in the fashion that we have engaged in, and Mr. Panzer was there at the time, and said nothing to the contrary.

MR. J. PANZER: That's true, Judge.

THE COURT: All right.

Off the record.

(Discussion off the record.)

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(Proceedings continues at 4:30 p.m in the courtroom with the jury in the box.)

THE COURT: Are all counsel here?

Gentlemen, in the last few minutes I received this note from the jury, which has been marked Court's Exhibit 17: "Friday, October 24, 1975, 4:25 p.m.:

"Judge Cooper:

"With the generous help of counsel and the Court we have moved well forward in our deliberations. We no longer find need for any -- and the word "any" is underscored -- of Anthony Verzino's testimony. We need no further testimony from Mario Perna re-read. We ask to see in the jury room the exhibits pertaining to cocaine and stipulations, if any. If you need a more specific request or different wording on this final request, please so instruct us. Thank you, sir.

Now, that cocaine matter was mentioned by the jury in one of its requests of yesterday.

The government rises to say something. What is it you want to say?

MR. AMOROSA: Judge, we have all the cocaine exhibits here on government counsel table.

With respect to the jury's request last evening, the answer to whether it was stipulated is yes. But we also have the cocaine if the jury would like to see the actual exhibits.

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THE COURT: You mean the stipulation is an exhibit?

MR. AMOROSA: At page 1771 there is a stipulation that it was cocaine. It was an oral stipulation entered into between Mr. Lang and the government. There was no written stipulation.

THE COURT: Is that so, Mr. Lang?

MR. LANG: I don't know. I don't remember that. I don't know what we are talking about now. I do remember entering into a stipulation saying if the chemist were called he would say it is cocaine.

MR.AMOROSA: That is what I am referring to.

MR. LANG: But the cocaine never went into evidence.

MR. AMOROSA: Yes, it did go into evidence. The packages of cocaine went into evidence. On page 1771 there is an indication of Government 52 received in evidence.

THE COURT: Mr. Clerk, will you take a look at what Mr. Amorosa holds in his hand and tell me whether that has been actually received and assigned what number?

THE CLERK: Government's Exhibits 50 and 51 have been received in evidence.

THE COURT: Thankyou. And those are the packages

containing the cocaine which this note refers to?

MR.AMOROSA: Yes, sir.

THE COURT: Very well. They are in evidence, Mr. Lang.

MR. LANG: I just didn't remember seeing them here.

THE COURT: I know. You are the height of uprightness and nobody is accusing you of trying to put something over, you are not doing that, you are not that kind of man. But there it is. They are in evidence, and I think what we will do is write out the stipulation and hand that to the jury, or bring the jury in and read them the stipulation.

I suggest youwrite it out. It is going to be exactly the wording that appears in the minutes. We will send that into the jury room.

Is that satisfactory to you, Mr. Lang?

MR. LANG: Yes.

THE COURT: Is that all right with the government?

MR. AMOROSA: Yes, sir, it is.

THE COURT: Is there anything else that anybody wants to say on this issue pertaining to cocaine and the stipulations? As I get it, that is all they are asking for.

Unless some counsel tells me that we should do

something else I take it you are all satisfied that what we propose to do meets with your approval, that counsel on both sides agree that is all we need do to satisfy this portion of 17. They say, "May we see in the jury room the exhibits pertaining to cocaine and stipulation, if any."

Very well. Will you write it out now in my presence and we will wait and send it in. Just head it up "Stipulation Between Counsel."

MR. AMOROSA: The stipulation appears for the record at page 1771 of the trial transcript.

THE COURT: You already said that. And that is what you are writing out.

Marshal, will you tell the jury we are about to send in what they requested in their last note.

Will you sign your name to it for the government and, Mr. Lang, you sign your name to it for the defendant.

May I see the stipulation just signed by counsel?

MR. VIRELLA: Your Honor, we would inquire of the Court whether we should put the page in the record in which the stipulation appears.

THE COURT: No, don't worry about that. Let's take a look at it. The stipulation just signed reads, "At this time the government and Mr. Lang have entered into

a stipulation basically that Government's Exhibit 50 in evidence and 51 in evidence contain hydrochloride, and a chemist, if he were called to testify, would so testify."

And it is signed by Assistant United States Attorney Anthony Virella and by Mr. Lang.

The Court directs that this be marked as Court's Exhibit 18 for identification, and send that in along with Exhibits 50 and 51. Turn that right over to the marshal.

Let the record show it is now 4:40 p.m. Thank you.

(Court's Exhibits 17 and 18 were marked for identification.)

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(At 6:17 p.m. the following took place.)

THE COURT: It is now 17 minutes after six, and just a minute or two ago we receiced word from the marshal that the jury wished to go to dinner. I direct that they be taken to dinner and I think that we should see to it that they are back here ready at 8 o'clock.

Marshal, will you kindly see to it that the jury is taken promptly to dinner, and by that I mean during the next few minutes, because that is what they want. They are to be returned at their convenience, but we will be back here

around 8 o'clock.

Do you understand what I said?

THE MARSHAL: Yes, your Honor.

THE COURT: Thank you.

(The jury was taken to dinner at 6:25 p.m. and returned to continue their deliberations at 8 o'clock p.m.)

(The following took place in the robing room at 9:15 p.m.)

(A discussion was had off the record.)

THE COURT: Let the record show that for the last ten or fifteen minutes at my invitation counsel had been good enough to join me in the robing room. That has been the kind of procedure we have resorted to during the last five weeks, where we have had off-the-record discussions at considerable lengths of time.

This particular conference was called around 9:15 or so this evening, when this note came to my hands from the marshal, and it reads as follows:

"Friday, October 24, 1975

"Your Honor: We have a procedural question. If a vote is not unanimous on a specific count, how do we handle it? Is it an automatic acquittal or what? Please advise us.

"Thank you, sir."

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Counsel have expressed their reactions to this and have given good reasons to sustain their position. I advanced for their consideration the following: That we answer specifically what happens when there is not a unanimous vote on a specific count; it is not an acquittal nor is it a conviction, and the matter still exists and is alive and has to be resolved one way or the other. I also suggested in view of the fact that it is in the neighborhood of 9:30 that I couple it with a reading of a fair Allen charge which does not involve any pressure and which emphasizes that every juror should recognize ... remember that if after I am through a juror still has an opinion that differs from others on the jury, and despite additional argument, retains that position, my remarks are not meant for one instant to get such a juror to capitulate to others.

The attorneys received that respectfully. They can see the reasoning for it, but they do not agree that all the reasons assigned for it are sufficient, and I thank them for their openness. They are unanimous that the Allen charge nor any form of it should be given at this time.

If I have not covered this properly, I invite whatever attorney wishes to speak up.

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MR. AMOROSA: I simply want to say that the government agrees with your Honor's position.

MR.J. PANZER: On behalf of the defendant DeLutro I would respectfully, of course, object to the Allen charge and ask the Court to answer the specific question and tell the jury if there is no decision on that particular count, that that count remains in abeyance, and include that each man or each woman has a right to the courage of his or her convictions and must not change their vote if they feel the way they do, their decision on that particular count.

MR. GOLDBERG: I want to state my own position for the defendant Pallatta. I don't join in Mr. DeLutro's position that he should go beyond answering that question with any statement that the jury or any juror should adhere to their convictions, because I think that invites the Allen charge, and I think you ought to just most respectfully for the defendant Pallatta's position respond to what is the effect of the failure to arrive at a unanimous verdict on any count. I take the position that there is no need now of the Allen charge. A great deal of today was concerned with the reading of testimony. It is the defendant Pallatta's position that the jury has not been deliberating sufficiently long, nor has it expressed

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itself in such a way as to warrant any Allen charge, modified or otherwise?

MR. EPSTEIN: I join in Mr. Goldberg's position.

MR. BLOSSNER: I do, too.

THE COURT: All join in it. You adopt it now, Mr. Panzer?

MR. J. PANZER: I do.

THE COURT: So the record is clear, I would like to have you know, as I told counsel, and I would like the record to reflect, that about a minute or two before I got this note I was prepared to come down and read the Allen charge, because as I estimate the time the jury has actually been in the jury room, not including the time that they were out in the courtroom either to hear a re-charge or to hear the reading of the testimony, it is between 15 and 16 solid hours, and I think that that would warrant the Allen charge.

At any rate, I am going forward as indicated.

Thank you, gentlemen.

(The jury entered the courtroom at 9:40 A.M.)

THE COURT: How are you feeling?

The Court has read with care your note. It is brief. Let me repeat it:

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"Your Honor, we have a procedural question. If a vote is not unanimous on a specific count, how do we handle it? Is it an automatic acquittal or what? Please advise us.

"Thank you, sir."

In essence, that particular count is still a live, vibrant count. It has resulted in neither an acquittal nor a conviction. It must be resolved some time. It takes a unanimous vote on any count, and if after due deliberation the jury is unresolved with regard to a particular case, that count is still alive and must be tried and disposed of some day.

You have deliberated now for a good number of hours. You have been one of the most outstanding juries that this Judge has come across for a long time. The spirit that you demonstrated has been nothing else than an inspiration. You have shown a desire, a keen desire, to fulfil your obligation as completely as I would want to with regard to my own obligation. Bear that in mind as I call your attention to some comments that I feel are appropriate. I want to make it clear, perfectly clear, crystal clear, that what I am about to say is not with a view to coercing you into reaching a verdict, certainly not to rush you into a verdict, or in any way to indicate

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impatience with your failure to have arrived at a verdict by this time. There is no element of impatience. That, to say the least, would be disrespectful of your efforts.

I have no desire in persuading those jurors who, after thorough consideration, deliberation and argument have reached a conclusion -- to change that conclusion. Remember, I say that with every bit of emphasis I can summon -- I have no thought in my mind of persuading those jurors who after thorough consideration, deliberation and argument have reached a conclusion to change that conclusion.

But I do believe that remarks by the Court may possibly aid you in your deliberations.

This is an important case. The trial of this case was comparatively simple. The fact issues have been sharply delineated. The trial has been expensive to both parties. If you should fail to agree on a verdict, the case is left open and undecided. Like all cases, it must be disposed of some time. There appears absolutely no reason to believe that another trial would not be equally expensive to both sides, the government and the defendants. Nor does there appear any reason to believe that the case can be tried again more expertly or more exhaustively than it has been, on either side. Any future jury must be selected in the same manner and from the same source as you have

been chosen. So there appears no reason to believe that the case would every be submitted to 12 jurors more intelligent, more impartial, or more competent to decide it,or that more or clearer evidence could be produced on behalf of either side.

While, undoubtedly, the verdict of the jury should represent the opinion of each individual juror, it by no means follows that opinions may not be changed by conference in the jury room. The very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves. It is normal for jurors to have differences. This is quite common. Frequently jurors, after extended discussion, may find that a point of view which originally represents a fair and considered judgment might well yield upon the basis of argument, further discussion, and upon a further review of the facts and the evidence. Frequently, further consideration may indicate that a change of original attitude is fully justified upon the law and the facts.

I will quote from a statement which is contained in a Supreme Court opinion:

"Although the verdict must be the verdict of each individual juror, they should listen with a disposition to be convinced of each other's argument; that, if the much

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larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of some men equally honest, equally intelligent as himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judtment which was not concurred in by the majority."

It cannot be that each juror should go to the jury room with a blind termination that the verdict shall represent his opinion of the case at that moment, or, that he should close his ears to the argument who are equally honest and intelligent as himself, who bear the same responsibility, serve under the sanction of the same oath, and have heard the same evidence with, we may assume, the same attention and an equal desire to arrive at the truth.

Remember at all times that no juror is expected to yield a conscientious conviction he or she may have as to the weight or effect of evidence. But remember also that the full deliberation and consideration of all the evidence, it is your duty to agree upon a verdict, if you can do so without violating your individual judgment and your conscience.

Consequently, I will ask you to retire to the

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jury room to continue your deliberation and carefully re-examine and reconsider all the evidene bearing upon the questions before you.

We are here to serve you; we will wait unpon you no matter what time it takes., and I want you to understand that these remarks are addressed to you questionas to what happens to a count that is unresolved. It would be grossly unfair to either side, it would be an outrage to justice if you were to just close the books because you may or may not, assuming you have arrived at some determination with regard to some counts of the indictment, it would be terrible to say, "Well, wehave arrived at such and such a determination; we have agreed, and we might as well close the books with regard to those other counts that we are not in uninimity about. Let us go one way or the other. and get it over with." You are not that kind of jury.

If after what I have said you should do you have done, so be it, and you report that uninimity has not been achieved with regard to those counts, such and such, and such and such and such and such, naming the counts and the defendant. That is it. Then you have exhausted yourself and you have done everything. You have leaned backwards and forwards. That is it.

All I want you to remember is that at no cost

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should you close the book with regard to any count on which you are deliberating without asking yourselves, "Has that count been proved beyond a reasonable doubt under the facts and on the law?"

And if you have a disagreement on it, let it be a disagreement, and that is it. I don't want any principle of law to be sacrificed because we want to close the books; you do your best; you struggle with it; you perform the operation like a surgeon does, hopefully, skillfully, with a prayer.

After having done that, you abide by the result.

So, I repeat, if after having done all that, with that same kind of diligence and that same exemplary spirit that you have demonstrated, and you have argued it and thrashed it out, you still feel you are unresolved for one reason or another, one way or the other with regard to the counts which you have not come to a conclusion about, and that will be it.

Madam Forelady, have I made myself clear?

MADAM FORELADY: Yes.

THE COURT: May I ask each one of you to indicate to me whether the remark I have made since I came out on the bench in the last ten or fifteen minutes and spoken to you have been crystal clear?

Mrs. Saunders?

JUROR NO. 2: Yes.

THE COURT: Mrs. Morrill, do you understand it completely?

JUROR NO. 3: It is pronounced Morrill.

THE COURT: I believe your whole attitude and your whole department has been both ethical and Morrill.

JUROR NO. 3: I didn't say ethical.

THE COURT: I certainly did. How can you be moral without being ethical? They blend. Forgive me. It is a wonderful name to have.

Have you understood what I said?

JUROR NO. 3: Yes.

THE COURT: Mrs. Dolan, is it clear to you, Madam?

JUROR NO. 4: I have a question, your Honor. The things that are agreed upon --

THE COURT: You have got to be careful in expressing

yourself.

JUROR NO. 4: I am not going to say anything more than that.

THE COURT: Will you write me a note, because it may be something that should not be uttered in open court. Will you abide with me just a moment? Talk over what you intend to ask me with your co-jurors, and if they adopt it and want it, you send it in to me.

JUROR NO. 4: It is not all that important.

THE COURT: No, please, don't make me feel badly. If you want to write it out now, I will take it.

(Jury writing.)

THE COURT: It looks like you're writing out the preamble to the Constitution.

JUROR NO. 4: I am not very terse, your Honor.

(Handing note to the Court.)

THE COURT: I have no hesitancy in reading it. It is an understandable question and it is a good question.

"The questions or counts which have been settled, will they now be considered disposed of or will all have to be tried again?"

I meet that head-on. Suppose you settle or come to an understanding with regard to certain counts, and suppose as you go on to reflect and to argue as to the counts

that still remain open and unsettled, and as you go forward with that argument in the spirit that I have outlined and according to theprinciples that I have indicated, you decide that what you already settled you are not sure of any more, why shouldn't you have an opportunity to reconsider everything from top to bottom. I want you to have all the time in the world not only in regard to those items that are unresolved, but even if you wish to go back to those that you settled, you got a perfect right to go and look at them again.

Is that your question?

JUROR NO. 4: No, sir.

THE COURT: Then what is your question?

JUROR NO. 4: Are those questions on which we can give an answer, do they finish the matter?

THE COURT: Certainly.

JUROR NO. 4: And on those questions which we cannot give an answer, are they only in abeyance?

THE COURT: I am glad of this question and I am glad I toldyou what I did tell you, because I want you to know t hat once in a while as a jury goes about deliberating, that with regard to a count that has been resolved the jury decides, "Well, I am not so sure after all with regard to a certain matter that I was sure of before and that I thought was all settled. I would like to

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have my vote re-considered." I want you to know that your thinking goes on with regard to all the counts until you deliver your verdict.

Suppose you come in and you say, "Judge, with regard to this count, this count, this count, this count we are unanimous, but as to these counts we are not. What happens, Judge?"

Well, from a practical point of view those unresolved counts may or may not be tried again, or they may be abandoned in the light of what was resolved by the jury.

But with that you should not have any concern and you should not let that enter into your deliberations at all. What you have to do youwill do, and what will follow will follow. Whether or not those unresolved counts will be tried again or not tried again is not your problem. You just exhaust yourself on your challenges, your mission, and, "This is it, Doctor, here is our prescription.

"If there is something beyond that, we can't do anything about it. This is the limit of our assignment."

Have I answered it?

JUROR NO. 4: Yes, I think so. Thank you.

Does anything occur to you, Mr. Hayne?

JUROR NO. 5: No, sir.

THE COURT: Mr. Brettschneider?

JUROR NO. 6: No, your Honor.

THE COURT: How about you, Miss Vining?

JUROR NO. 7: I understand.

THE COURT: And you, Mr. Sprung?

JUROR NO. 8: You inspire us, Judge.

THE COURT: Well, you are kind.

How about you, Mrs. Smith?

JUROR NO. 9: I second his comment.

THE COURT: You are kind. Thank you very much, ma'am.

And I take it what I said was crystal clear to you?

JUROR NO. 9: Yes.

THE COURT: Mr. Fallon, what do you say?

JUROR NO. 10: Yes.

THE COURT: And Mrs. Harrow?

JUROR NO. 11: Yes.

THE COURT: Now, Dr. Cogen?

JUROR NO. 12: Your statement is clear, but there is a purely formal problem which I think may have led to some of these questions and confusion.

THE COURT: Don't disclose it.

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JUROR NO. 12: Not to do with the case.

THE COURT: Don't even suggest what is going on in your thinking

JUROR NO. L2: The form that we received to fill in has, if I recall correctly, a space for guilty and a space for not guilty, and no place where you can indicate disagreement. That is why there is uncertainty.

6 THE COURT: Oh, my heavens, it just shows that we can't be too careful, that you have to have a column for not only guilty and not guilty, but you have to have a column which says "Unresolved," or a word to that effect. As to those counts that you have not resolved, just say "Unresolved,"or "Hung jury," or "We differ," or "It is not unanimous, or whichever words you wish to indicate clearly that it is neither guilty or not guilty, or you can just put an X never to each one of the columns, and that means "Unresolved."

JUROR NO. 12: That is what I thought.

THE COURT: We have had juries here to one and 2 o'clock in the morning in winter, below zero. I have been here when it happened on more than one occasion. This is not an enticement to get you to stay. I just want to know ifyou are still in the mood and are not tired out, because I don't want you to get brain weary, because brain weariness

does not produce good results. If anybody is brain weary and really can't go on, you are tired out, just say so. That is it. Ifyou can't arrive at a verdict consistent with the doing of justice, we would like to know it, for you are to obligize nomne, but your own oath an your own conscience.

(The jury retired to continue its deliberations at 10 o'clock p.n.)

(At 11:50 p.m. jury enters the courtroom.)

THE COURT: In order to bring everything up to date, I would like to have the court reporter have the record reflect it is now 11:50 p.m., and that about a minute I received what has been marked Court's Exhibit 20 for identification, and which I regard as one of the most precious documents that has come to me during the course of my judicial career.

It reads:

"October 24, 1975, 11:30 p.m.:

"Your Honor: We have a verdict in the case. Thank you and bless you, sir."

Mr. Clerk, please proceed.

THE CLERK: Madam Forelady, have you agreed upon a verdict?

MADAM FOPELADY: Yes.

THE CLERK: How do you find the defendant Magnano on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Magnano on Count 2?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Magnano on Count 3?

MADAM FORELADY: Cuilty.

THE CLERK: How do you find the defendant Magnano on Count 4?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Pallatta on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: Count 2?

MADAM FORELADY: Guilty.

THE CLERK: Count 3?

MADAM FORELADY: Guilty.

THE CLERK: Count 4?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Bolella on Count 1?

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MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Bolella on Count 2?

MADAM FORELADY: Unresolved.

THE CLERK: Count 3?

MADAM FORELADY: Unresolved.

THE CLERK: Count 4?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant DeLutro on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant DeLutro on Count 8?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Soldano on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Soldano on Count 9?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Gwynn on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Gwynn

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on Count 10?

MADAM FORELADY: Guilty.

THE CLERK: Count 14?

MADAM FORELADY: Unresolved.

THE CLERK: Count 15?

MADAM FORELADY: Unresolved.

THE CLERK: Count 16?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Chapman on Count 1?

MADAM FORELADY: Unresolved.

THE CLERK: How do you find the defendant Lucas on Count 1?

MADAM FORELADY: Guilty.

THE CLERK: How do you find the defendant Lucas on Count 5?

MADAM FORELADY: Guilty.

THE CLERK: Count 6?

MADAM FORELADY: Guilty.

THE CLERK Count 7?

MADAM FORELADY: Guilty.

THE COURT: We will poll the jury. May I make a suggestion, that the forelady and the jurors hold in their hands the forms that were submitted to the jury,

and I would appreciate it if when the jury is polled the jurors be good enough to take a look at the papers that the forelady holds, read them, and say that that is their verdict.

(The jury was polled by the clerk.)

THE CLERK: Let the record show that in the presence of counsel and the each juror took the several sheets and examined them and stated that that reflected their verdict.

Ladies and gentlemen of the jury, the hour is late, but I refuse to let you go without spending a minute to tell you what you already know I would say, and that is the deep sense of gratitude that the Judge has and I am sure counsel in their sense of fairness have for you in this case, whether they agree or disagree with your verdict in this case, a case that affects so much the citizenry and results in the unhappiness of vast multitudes throughout the land. And one we hear on all sides that no one cares, that no one has courage any more, your answer, your sense of concern in this case is the lie to that comment. It does take courage, it does require unquenchable thirst to do the right thing.

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The simple copybook maxim of honor and decency and uprightness that so many scoff at and belittle asserts

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itself all the time, and I thin that that is the salvation of our country. Without it we would be a veritable jungle.

And when we look at the dirt and filth here and there, and then look across the street and see the glory of human beings with a fine spirit, we should not despair. It exists with this kind of a jury, and with jury after jury as I have witnesses, now and as they were when I first went on the bench. All of us need inspiration, all of us need encouragement. I told you that once before; I tell it to you again. I go on to my next case, the next operation, spurred on wtih a knowledge that there are among us all the time citizens who meet the challenge, no matter what it entails, and I would have said each and every word of what I have said if your verdict had been the opposite of what it actually is, because what you have decided is your business.

Those who wish to disagree have a perfect right to disagree. They didn't have the responsibility, they didn't undertake the oath and the mission that the law required and imposed upon you. All I asked, as I indicated throughout, that one exerts oneself to the extreme and uphold the law and call it as he or she sees it as it comes across the plate. And on that I have every confidence you have done

so according to your right.

You thanked me and you said, "Bless you," and I think you and I bless you.

Marshal, take these ladies and gentlemen from this courtroom directly to the jury room, where they will get their garments; take them immediately to the limousines that awati below. They will be escorted to their homes, each and every one, as has been the practice during the last two or three nights.

May I suggest with great respect to the ladies and gentlemen of the jury that the better part of wisdom would dictate that anybody who wants to pry, to find out what went on in the jury room, that what went on there was your business and no one else's business, and if they can get somethingout of you, they will try to get it. You resist it by having nothing to do with them. I can't give that as an order. I ask you to consider its wisdom and say that a moment of exultation or expansion is not worth the deep regeet and the unhappy results that it may bring about. You understand what I am trying to say.

Thank you again. Good night, ladies and gentlemen.

(Jury discharged.)

THE COURT: Let the record show that the jury left us at midnight. Please take your seats.

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MR. EPSTEIN: As to certain defendants there are unresolved counts. As to Bolella, Counts 2 and 3 are unresolved.

THE COURT: Why did you get up after the jury was gone? Why didn't you speak while they were here? What do you want me to do about it?

MR.EPSTEIN: Was your Honor going to continue deliberations? I am not consenting to the withdrawal of a juror.

THE COURT: I heard what you have to say.

Does anybody else want to say anything before we go into the matter of motions addressed to the verdict?

MR. AMOROSA: With regard to the unresolved counts, your Honor can declare a mistrial as to those counts.

THE COURT: I know what I can do. I just want to take things in order.

I will take motions addressed to the verdict.

MR. GOLDBERG: Would your Honor permit the defendants to reserve until the day of setence the making of motions, or one week prior to the sentence date any motions addressed tothe verdict?

THE COURT: I am glad to. The Court wishes to extend to both sides any courtesy it can extend to them.

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The application is granted.

Mr. Epstein's application likewise will be entertained in the same fashion.

MR. EPSTEIN: Thank you, your Honor.

THE COURT: I take it there is nothing before us, except to consider what the government would like to have done with respect to the custody of the defendants between now and the date of sentence?

MR. AMOROSA: We move for the remand of all defendants under Title 18, United States Code, Section 148, with the exception,of course, of the defendant Chapman, on whom the jury was hung, Judge.

MR. GOLDBERG: The government has asked for the remand of these defendants without any atatement that would indicate that there are any issues that would make this case as one not substantial of appeal, and the government has made no showing by any statement here that these defendants pose any risk of flight or danger to the community. These defendants, or the defendant for whom I speak, Mr. Pallatta, knew of the pendency of this indictment, when the govenment have his family notice of it, and he arranged through me to contact the United States Attorney's Office, and he voluntarily came in and surrendered himself. He has been held on what I consider to be fair and reasonable

bail as set by Judge Frankel of $10,000, $100,000 PRB. He posted as collateral for that bond the family dwelling, and I represented to Judge Frankel that by the posting as collateral the family dwelling, which would risk forfeiture should he flee, that would assure the Court of a basis to fix bail in the sum as it did of $10,000.

In that house resides his ten year old child, his elderly mother, who is confined to a wheelchair, her leg having been amputated from a complication of diabetes, and his wife. He comes before the Court with no prior record, except for a burglary conviction some twenty years ago. He has been faithful in his adherence to any conditions imposed upon him by your Honor; he knows the way he has been treated by your Honor; he knows that if ever he has to adhere to any terms and conditions imposed by the Court, it is now when he faces the possibility of a heavy punishment. I suggest that he would not flee at this time, but that you can count on his faithful adherence to any terms and conditions you set by way of bail.

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This defendant is known to me. I can say he has never given me cause for concern that he would not show up. He has understood the risks that he faced during this trial. I have never kept from him my analysis of the case nor my understanding of the probabilities, and yet he

is here, and I submit that he poses no risk of flight. I suggest that the government has not represented that this defendant is engaged in any conduct would pose a risk to the community from at least the time of his arrest until today, and I say that you can safely treat him as a bail risk without fear that he will flee this jurisdiction and put himself beyond the reach of process. I don't see anything from the government's bald statement that he ought to be remanded or that there should be a change in the conditions of his bail.

THE COURT: Mr. Amorosa, I was somewhat taken aback at the thrust of your comment. You have a burden, sir, and you will meet that burden. There have been occasions in the past when in my humble opinion I had to say that I did not think you had. Now, don't add to it. This is no way. You think this is a government victory, and, therefore smooth sailing, that whatever you wish goes. That is not the proper spirit, and I don't think that that is the impression you really want to convey.

Now, I will give you your chance to speak up as you should and must.

MR. AMOROSA: Yes, sir. The defendant Pallatta now faces, your Honor, on the day of sentence 60 years imprisonment for his conviction in this case. This is not

mail theft or bank larceny or embezzlement. The conviction in this case came as a result of proof before your Honor of Mr. Pallatta's involvement in a major heroin conspiracy, a conspiracy which has affected the community in which we have have resided over the last several years terribly and detrimentally. We submit the findings by a jury of 12 people, Mr. Pallatta's peers, shows that he was involved in this conspiracy, that the witnesses Verzino and Perna were telling the truth on the witness stand with respect to his involvement, that there has been established beyond question that Mr. Pallatta at this point in his life and over the last several years has presented a serious danger to the community in which he resides.

Additionally, I would like to bring to your Honor's attention that Mr. Pallatta's associates, and now we can say that this jury has found beyond a reasonable that Mr. Macchiarola, Mr. Carbone, Mr. Margiasso and Mr. Ferraro were close associates of the defendant Pallatta. All those defendants in this case are, in fact, today fugitives from justice, along with.

We have many fugitives in the indictment. Mr. Pallatta faces 60 years, and the fact that there is a substantial chance of his getting a very serious term of imprisonment convinces us that the risk of flight of

Mr. Pallatta in this case is very substantial. Therefore, with respect to Pallatta we submit that under Section 3148 your Honor can make two findings: One, in view of the fact that there are other fugitives in the case, in view of the fact that Mr. Pallatta faces a substantial term of imprisonment, your Honor may make a finding that there are no conditions under which Mr. Pallatta can remain free on bail without a substantial risk of flight; secondly, the fact that the jury made a finding in this case that Mr. Pallatta was guilty of these terrible misdeeds establishes, we blieve, your Honor, the fact that he at this time poses a risk and a danger to the community in which he resides.

Your Honor,as the proof has indicated, Mr. Perna has testified and Mr. Verzino has testified thousands upon thousands of dollars went into the hands of the defendant Pallatta during the course of this conspiracy.

The conspiracy under the indictment ran right up to the date of the indictment, July, 1975. The jury has made a determination that proof was supported beyond a reasonable doubt. Therefore, it is our position, your Honor, that your Honor is bound by that proof, that proof that indicates that Palletta at this time has in his possession resources which will permit him if released on bail in this case, no matter what bail your Honor sets, to escape, to jump bail,

not to come before your Honor when the day of sentence, to possibly join Macchiarola, Carbone, Margiasso and Ferraro, who also are fugitives.

What I am saying now, your Honor, not only applies with respect to Pallatta, but applies with respect to each and every one of these defendants who have been convicted here. Substantial amounts of money, running into the hundreds of thousands of dollars, were placed into the hands of these defendants during the course of this conspiracy, which ran to the middle of 1975. Basedon this, not only are they a danger to the community and not only has this jury, their peers, found that they are a danger to the community in which they reside, but the fact that they have this money, Judge, we submit establishes beyond question that no conditions that your Honor imposed, even $500,000 cash bail would assure their presence in this court on the day of sentence.

That, in substance, is our position, Judge.

THE COURT: I will reflect on it. Let's go to the next defendant.

MR. E. PANZER: I adopt all the arguments presented by Mr. Goldberg. I don't want to be repetitive.

Mr. Magnano is forty-four years old. He does have some prior convictions for policy. He is on $10,000

bail. He put up the deed to his house with a bondsman, He lives at home with his wife and his child, who is sixteen years old, and his mother, who is eighty-two and who has cancer.

Mr. Magnano has been in court each and every day he is supposed to be in court. In fact, at the inception of thioscase Mr. Magnano and myself came down to your Honor's chambers and we were in the process of negotiating a plea of guilty to some of the charges in the case, and when we were ready to plead guilty Mr. Amorosa came down, said if the plea was taken there was no representation that no other cases will be brought against him, and that prevented us at that time from taking a plea in this case. I merely point that out to your Honor, if a man is going to run he is not going to come down and say,"I plead guilty to the charges," because your Honor could have remanded him on the spot at that time. He has been and he is willing to submit to any condition that your Honor imposes. He is an American citizen; he has no passport.

If your Honor wants to impose the condition that he report here every day to the United States Marshal, he is willing to do that. And if you want him to report to Mr. Amorosa every day, he will. He has nowhere to go. The roots in the community are here, and Mr. Magnano and

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myself respectfully request that you allow him to go out on bail at this time until the day of sentence

THE COURT: We say that guilt is personal, and I don't like these broad statements as applicable to everybody.

And so I am going to insist that the government say whatever the government wishes to say with regard to every human being found guilty, and say so simply.

We will consider now that the government has made application with regard to Magnano and has not furnished the basis for its application.

MR. AMOROSA: May I do that at this time, your Honor?

THE COURT: Yes.

MR.AMOROSA: The proof with respect to Magnano is similar to the proof with regard to Pallatta. Magnano, as well as Pallatta,took tremendous amount of cash into his possession in the course of this conspiracy. All the arguments that I made, Judge, with respect to Pallatta, are equally applicable with respect to Magnano. The proof establishes there is relationship. Although Magnano was not present on each and every occasion when Perna met with the co-conspirators from the Bronx in connection with this, there is no question that he was an integral part of the conspiracy in

this case, that he himself was present when large amounts of money were turned over to Pallatta and the other co-conspirators in this case from the Bronx.

And your Honor is familiar with that portion of the conspiracy I am directing my attention to. Each argument I made with respect to Pallatta again equally is applicable to Magnano as well as Bolella, of whom I shall speak of in a few minutes.

With respect to prior convictions, I did not mention prior convictions with respect to Pallatta because I don't think they are relevant. The verdict of this jury a few minutes ago pales into significance anything these three individuals may have done in the past. These crimes are heinous. We don'thave to establish before your Honor to show your Honor that they may have fled in the past with respect to other crimes. The possible punishment in this case, the substantial likelihood of a long term of imprisonment, establishes in our view with respect to Magnano, as it did with respect to Pallatta, that no condition of bail could assure his appearance in this court, and, secondly, that he at this time poses a substantial risk and danger to the community in which he resides.

THE COURT: Call the next defendant, Mr. Amorosa,

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because you are making the application to the Court. Which one do you call?

Mr. Epstein rises. Do you want to call his client?

MR. AMOROSA: Yes, sir. With respect to Bolella, Mr. Bolella is the third defendant who was part of this fringe of the conspiracy emanating from the Bronx. Although the jury was hung on two counts with respect to Bolella, he was found guilty on the conspiracy count and on Count 4. He faces a maximum term of imprisonment alone of 30 years. His guilt has been established, as well as that of Pallatta and Magnano in this conspiracy by the finding of the jury, and we submit that your Honor is bound by that.

Mr. Bolella, as well as these other defendants, had access to tremendous amounts of cash.

Your Honor there is no reason to believe at this time that that cash is not still available to Bolella. The conspiracy, again, according to the grand jury went into the middle of 1975, right at that moment. We submit, your Honor is bound to believe that Mr. Bolella, Mr. Pallatta, and Mr. Magnano have access to tremendous amounts of cash. There is no question that the cash exists. We found $585,000 in cash, approximately, in Lucas' house. We did not find any cash with these defendants, Judge.

Therefore, they must have that cash now. We submit

that your Honor is bound by the proof in this case that they do have that cash and that they will join Macchiarola, Carbone, Ferraro and Margiasso in flight in this case.

THE COURT: I will hear from counsel for Bolella.

MR.EPSTEIN: Your Honor, very briefly, Mr. Bolella voluntarily appeared in this court before your Honor on February 5th of this year and voluntarily surrendered in response to the charges which have been set forth in this indictment and on which we just had this jury's verdict. Mr. Bolella was informed of the existence of these charges by his wife, who had been visited at her home by agents of the Drug Enforcement Administration. He arranged through me to voluntarily surrender himself. We appeared before your Honor on February 5th,1975, and under oath he answered several inquiries. He is 44 years old and he resides with his wife, and they have one boy by that marriage, his wife having two children by a former marriage. They reside at 340 Central Avenue in Scarsdale.

He was employed by Park Motors and had been in this particular line of work for some time. He has no prior criminal record. He also indicated to your Honor at the time of his dishonorable discharge from the armed forces in the early 1950s, and that was a subject of a pretrial memorandum in this case. Your Honor at that time after

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hearing Mr. Bolella under oath set bail in the amount of $50,000 personal recognizance bond, which was further secured by the posting of a surety bond in the amount of $15,000

Needless to say, that collateral is still available. Your Honor, in response to the government's argument concerning considerable sums of money, based on the verdict which this jury has returned, the last act of which Mr. Bolella engaged in involving narcotics took place in November, 1973, and even assuming that the contraband in this particular instance was paid for completely, that is almost two years ago, your Honor.

I would submit that the passage of a two-year period of time would more than serve to dissipate whatever profits, if any, actually passed into Mr. Bolella's hands from such a transaction. I submit that there is nothing to substantiate the government's allegations that Mr. Bolella is either in possession or has access to substantial amounts ofcash.

I would point out to your Honor at the time Mr. Bolella appeared before your Honor in February a question was raised as to the property he at one time owned in the State of Florida. He had disposed of the prperty and the money was on deposit in a bank account at the Chase Manhattan

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Bank. I saw the bankbook. Due to economic reverses in the summer of 1974, Mr. Bolella was actually out of work for five months. Of the $19,000 that was deposited at that bank, there is just $2,000 or $3,000 left.

Your Honor, at this time in view of all the facts and circumstances before the Court and in view of the jury's inability to reach a verdict on two of the counts on which Mr. Bolella was charged, in view of the fact that that reduces his exposure to punishment, I would ask your Honor to continue the bond which was originally set in February.

He has been in court not only for the trial, but on any occasion when the Court has summoned him prior to the trial. I would ask that his bail be continued, your Honor.

MR. AMOROSA: Your Honor, may I be heard for a few seconds with regard to Bolella? Mario Perna testified that from approximately April of 1973 to approximately August of 1973 he paid Pallatta, Magnano, the crew in the Bronx, that aspect of the conspiracy emanating from the Bronx, approximately one-half million dollars in cash. Also he testified that during conversations with Pallatta, Magnano and others from the Bronx, that Bolella was present on one occasion, and that they indicated to him in substance that they had another customer besides the

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Verzino-Perna-Malizia partnership, to whom they were giving even more goods than they were giving that partnership, Judge.

So not only must your Honor be bound by the proof that these people received a half million dollars in that four or five month period, but your Honor must assume that this jury has made a determination that they received one million dollars, an amount equal to the amount paid by Perna, Verzino and Malizia in that period of time, thatamount being paid by that other unknown customer.

THE COURT: In view of your additional statement, I will afford Mr. Epstein opportunity to say something additional.

MR. EPSTEIN: I think the jury has made it clear by the findings of fact which they made according to this case that Bolella's participation in the conspiracy was a belated one and that the profits which were accumulated up to and including August, 1973, were not profits in which Bolella joined, that Mr. Bolella's actual joining of this conspiracy actually occurred with the conference or meeting that took place in late September or early October, and that although Mr. Bolella having been found guilty on the conspiracy count, and there is no proof that he joined in or would share in any of the profits

that were accumulated by the members of the conspiracy prior to the time he joined, and that the passage of time since the indictment would more than serve to dissipate whatever profits in these illegal transactions may have at one time existed in this matter.

MR. AMOROSA: With respect to DeLutro, your Honor, as with the other defendants, the money that DeLutro received from this partnership has never come to light, that is, the $250,000 that he was paid in November of 1973 in connection with the distribution of 5 kilograms of pure heroin to Verzino.

With respect to DeLutro we submit that under no conditions can the Court adequately assure his presence for sentencing in this case by imposing a condition of release.

Secondly, it is our position that the findings of the jury in this case established that he poses a danger and risk to the community in which he resides. The proof in this case with respect to DeLutro establishes that he uses three names -- Anthony DeLutro, Tony West, and I believe the third name was Anthony Rossi, a name under which he flew to, I believe he stated, Atlanta. But your Honor's recollection may be better than mine in connection with this. He may have flown to Florida. But he did use a fictitious

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name in flying to another city.

The proof with respect to DeLutro, however, was not limited to simply 5 kilograms. Verzino testified that the five kilograms almost came as a sample from DeLutro with respect to what he had access to in this case.

I believe Verzino testified that after he took the 5 kilograms, there were discussions between him and DeLutro with respect to DeLutro possibly supplying ten or fifteen additional kilograms of pure heroin.

11 Your Honor is aware from the testimony in this case, and I direct your attention specifically to Agent Bradley's testimony -- that one kilogram of pure heroin is worth on the street of this city one million dollars. Mr. DeLutro sold 5 kilograms one pure heroin to Verzino -- $5 million worth of poison, your Honor. He had access to probably an additional 10 or 15 kilograms just at that time, in November of 1973. The finding of this jury establishes that that activity continued up until the day of the indictment, that is, the middle of this year. We have not seized any money from this man. We submit, as with respect to other defendants in this case, that he has at this time substantial amounts of cash on hand with which to flee and escape the consequences of his acts in this case. He has a narcotics convicton dating back to 1955.

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The rap sheet shows he has two narcotics convictions, one state and one federal. He also was arrested on June 18, 1957, for being a sugitive from justice, although I believe that that charge was dismissed. He was convicted, as was brought out in the testimony, of conspiracy to sell liquor without a license in 1971. And with respect to that, your Honor, it is my understanding, and, in fact, I can represent to the Court, that he was convicted after being found guilty in this courthouse before the Hon. Judge Motley, and remanded at thattime immediately following his conviction, immediately following the finding of the jury that he was guilty in that case. That was a liquor violation, Judge.

Here Mr. DeLutro is a second offender in this case. He was convicted undertwo counts. He facts 30 years on each count, 60 years maximum, the likelihood of a very sever prison term with respect to DeLutro, as he has already two prior narcotics convictions.

THE COURT: Mr. Panzer?

MR. J. PANZER: Your Honor, I have listened to Mr. Amorosa here. The defendant DeLutro is referred to as a danger to the community as set forth in Section 3148. Now, under the conditions as we have here, all defendants being a danger to the community as Mr. Amorosa would want you to believe, is a sort of a shield or a blanket to cover

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Section 3148. They can say every defendant is a danger to the community, et cetera, et cetera. It is a nebulous remark.

Let me tell you something about Mr. DeLutro. First I would like to talk about that charge of his being a fugitive. Mr. DeLutro was in jail at the time this fugitive charge came about, and the case was dismissed because he was not a fugitive. While he was in jail he was released to go home to his mother's funeral by himself, and to his wife's funeral, who had died in an automobile accident.

I have known Mr. DeLutro for the past 35 years. I have had occasion to be his lawyer on previous matters, and I am his lawyer today.

Your Honor, the defendant has four children, and the tremendous amounts of cash which Mr. Amorosa would want the Court to believe he has are really non-existent.

If we look into the background of this conviction and if we are to believe Mr. Verzino, Mr. DeLutro told Verzino that the people he was getting heroin from might be able to supply him with more. But that is only Verzino's statement.

Now, your Honor, Mr. DeLutro does not have tremendous amounts of cash. He went to Vegas under the

name of Albert Rossi, not to Atlanta, not to Florida. Mr. DeLutro has used the name of Tony West since he has been a boy of 15 years of age.

Your Honor, I am practicing many years and I have never done this before in open court -- I will take full responsibilityfor Mr. DeLutro's appearance in this court on the day of sentence.

And while I do not like to say this in this court because it involves another Judge, I am going to say it on the record, that I must take into consideration the type of Judge that sentenced him to two years for a liquor violation and remanded him the day he was found guilty. I must say this on the record, because I have been flabbergasted and horrified -- for a liquor violation this man should be sentenced to two years, "Take him away."

Now, Judge, again I tell you that the defendant does not have tremendous amounts of cash. That is, to use an expression, "a lot of boloney," to use the vernacular. He is a man who makes a living; he has an income from a flower store, he does manage a restaurant, and he does have a cafe from which he derives an income. This transaction was an isolated transaction and, if it did take place,in 1973. There is no evidence, even though Mr. Amorosa says "Up to the date of this indictment." That is boilerplate, to use

another expression. I don't like to use these expressions, but they are descriptive. He did not engage in any other unlawful transactions since the alleged date of this transaction in November,1973. The defendant if he is released on whatever bail your Honor decides to set in your Honor's wisdom, will be here.

As a matter of fact, Judge, I believe your Honor knows this, because I tried to negotiate a plea in this case. We just could not arrive at a substantial agreement here. That was all with Mr. Amorosa's and the Court's approval. It is needless for me to tell you, he has been here all the time. But I tell you now, Judge, that if he is released, if your Honor decides to set bail,he is going to face the music and he will behere., and I personally will take full responsibility. I know him, I know his family, know him many many years,and I would like toleave the court with these thoughts.

MR. AMOROSA: With respect to DeLutro, we could not arrive at a plea in this case because it is the government's position that DeLutro is and has been a major trafficker in pure heroin, and that applies not only with respect to pure heroin, but with respect to cut heroin, with respect to the defendants Palletta, Magnano and Bolella. That is why the government was opposed to taking a

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plea in this case to one count.

The next defendant, Judge, I would like to speak to is the defendant Soldano. The defendant Soldano received -- and your Honor is bound by the proof -- $75,000 from Anthony Verzino at the end of January, 1974.

He received an approximate additional $75,000 prior to Verzino's arrest on February 25, 1974, for the sale to Verzino and Perna of three kilog rams of pure heroin.

Your Honor is, of course, aware of the distinction between pure heroin and cut heroin. Individuals dealing with pure heroin, Judge, are associated with the importers of that heroin into this country. Those importers are members of a large international heroin traffic ring. Soldano, as with DeLutro, has access to that $15,000 in cash since the beginning of 1974, and we don't have it to this day.

Your Honor is bound by the finding that it is indeed possible, if not probable, that Mr. Soldano has that cash on hand right at this time, if not more cash. The fact that he sold Verzino three kilograms of heroin at that time does not mean that he was not selling other kilos of pure heroin to other individuals at the same time.

Again, with regard to Soldano, as with the other defendants, his dealing in substantial quantities of pure

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heroin establishes that he at this time, as in the past, poses a substantial risk anddang er to the community in which he resides, and that no conditions could adequately assure his presenton the day of judgment in this case.

Mr. Soldano also has a prior narcotics conviction which is quite old, I believe it is in the beginning of 1950s, 1951 or 1952. But this, Judge, only supports the government's position that these individuals have been engaged in this business for tremendous periods of time.

Just briefly, with regard to Pallatta, Magnano and Bolella, they were doing this in the beginning of the 1960s. Magnano introduced Anthony Verzino to narcotics, and there cannot be any question in your Honor's mind that if Verzino had stood trial and was found guilty here he would have been remanded without bail. Our position is not that bailshould be substantial with regard to these defendants, but that there should be no bail, that there should be an immediate remand without bail. That is our position with respect to Soldano.

MR. BLOSSNER: If your Honor please, Anthony Soldano has kept the faith with the Court; he has appeared in each and every day of trial, and he has been here quite ea[illegible], although he lives out on Long Island. He is here before 9 o'clock each and every day. For the last two days

the jury has been deliberating, he has gone out to lunch and to dinner and he has returned on time each and every day, up to an including this moment. I don't mind telling your Honor with your 46 years of experience on the bench, the first day of deliberations of the jury there was a very sour note for every defendant here, they wanted to know more about conspiracy. At that very moment the question asked seem to spell doom forthe defendants, and yet since that time this defendant has returned to the court, has kept faith with the Court, and the Court should show a reward of that faith by releasing the defendant upon bail.

If your Honor please, this case received wide publicity when the initial indictment came out in January of this year. The defendant during that time was coming back and forth to this building, as your Honor knows, to the grand jury one floor above us right now, that grand jury investigating gambling in New York County. We made several trips to this very building, your Honor, as I have told your Honor before, the defendant appearing with me each and every time.

Finally, some time, I believe, in May or June, the defendant was arrested under the name of Visconte. He was brought before the Magistrate and bail was set under the name

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of Visconte in the amount of $250,000. The defendant languished for 13 days unable to make that amount. The United States Attorney informed me any day an indictment having his true name would come out. Finally, before Judge Inzer Wyatt there was an indictment with the true name and the Judge finally reduced the bail to $25,000. With bail in the amount of $25,000 it still took the defendant several days to post bond, and that bond was secured by his family dwelling in Port Washington.

At his family dwelling he lives with his wife and a 12-year old child and a 10-year old child. It has been quite hard these past few months explaining the impending matter to his children. It did not sit well with his 12-year old child, a young boy. He has quite a problem explaining to him the matter, and, in fact, his son had to undergo therapy. His son is now home, but to explain this to him will take some time before the defendant is sentenced. I would ask the father to be in the home to help the wife, to help the son, who has recently been returned from psychiatric care.

13 The defendant understands that he is facing quite a substantial sentence. In view of that fact, your, in view of the fact the defendant has shown respect for the Court and for his family, I will ask that you continue this

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until the day of sentence on that bail.

Thank you.

THE COURT: Mr. Amorosa?

MR. AMOROSA: Let me speak generally about all the defendants. The context we are in at this time is different from the context we were in an hour ago. An hour ago these defendants did not face substantial jail time. Now they do. So all arguments addressed to your Honor with respect to their prior appearances in court, we submit, are inapplicable to the context we are in at this time. A jury of their peers has determined that they are major heroin traffickers, and this should be looked at by this Court with that in mind.

Next defendant is John Gwynn. Mr. Gwynn had been convicted of homicide in 1959, manslaughter first degree, I believe, by his own testimony. He received a sentence of from 15 to 20 years. He is currently on parole with respect to that. He also in 1956 a conviction involving drugs.

Gwynn's participation in the conspiracy was that of a customer of the Perna-Verzino-Malizia partnership. Perna's testimony was that beginning in March of 1973 and continuing up until the date of his arrest, the beginning of February, 1974, he supplied the defendant Gwynn regularly with amounts of heroin approximating one-half kilo in range.

I don't think that Perna testified he ever gave Gwynn over a kilo on any one occasion. But he did testify of repeated distributions to the defendant Gwynn in that period of time.

Vasquez testified as to Gwynn, and your Honor is bound by Vasquez' testimony, at least with respect to the heroin. I understand that the jury was hung on Mr. Gwynn as to the cocaine counts, but it did convict Mr. Gwynn on the Vasquez heroin counts.

Gwynn, although the proof does not establish that he had access to millions, as it did with respect to other defendants, regarding Gwynn there is no question he had access to thousands, and possibly tens of thousands of dollars in this period of time.

The jury rejected Gwynn's testimony as to employment, and the jury's verdict in this case found Gwynn was in the heroin business, that he had subordinates in this business during that period of time. Nothing your Honor can do now in terms of imposing a condition of release could adequately assure this person's presence in court on the day of sentence.

Also, the jury's finding establishes beyond question that this man, as well as the other defendants in this case, is a danger to the community in which he resides

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and should be remanded immediately.

MR. LANG: If your Honor please, John Gwynn admitted on the stand of the homicide, and he said he spent thirteen years in jail. Mr. Amorosa seems to think that is new. The other thing, Judge, out of the five counts in this indictment the jury could not resolve two of them involving Vasquez.

Now, Mr. Amorosa says, you know, they have their friends and they have a lot of money."

John Gwynn cannot say that, Judge. John Gwynn didn't know any of these people prior to coming into court, any of the defendants here in court. The indictment, Judge, only charges Gwynn with a quarter of a kilo. That is all. And I believe the testimony along the lines of a quarter of a kilo indicated that it would go for about $8,000.

The last involvement of Gwynn was in 1973 insofar as Perna and Verzino were concerned. Gwynn is the only fellow who has been honorably discharged from the Army in this courtroom, and that was during the Korean conflict, your Honor.

Judge, he will report any place, any time, daily, to anyone. There is no problem of John Gwynn going anywhere. He has no money to go anywhere. He is not a danger to

the community, as Mr. Amorosa seems to indicate. But, again, Judge, the big thing, Mr. Amorosa is worried about him taking flight. Well, he will have daily contact with Amorosa, if Mr. Amorosa wants that, every 12 hours or whatever, Judge. That is all I have to say, your Honor.

MR.HOFFMAN: I am sorry. I don't want to interrupt. I am not aware as to Mr. Lucas that there is any question of bail here. His bail had been revoked. Mr. Lucas is under remand. So there is no argument to be made.

MR.AMOROSA: I do not intend to make an argument with respect to the remand of the defendant Lucas, as he has already been remanded and is under court order. He cannot be released from custody unless the Court issues an additional order.

THE COURT: I understand that. But since you mentioned the defendant Lucas, I promised him that I would see that medical attention was given him, and I want to make good my promise, regardless of whether he had been convicted or not. I want medical people in the Corrections Department examine him, and if an operation is necessary, that he be operated on.

Now, Marshal, you are the one I want to address this to. When a Judge makes a commitment and tells you to fulfil it, you have to fulfil it. That is quite clear, isn't

it? You can't substitute your values for mine. I am the one that is directing it. I have no particular likes, of course, for Mr. Lucas. But he is a human being and I made him a promise. I want that promise kept. Please see to it what I have just said on the record is carried out. I want him to be examined, and if he needs to have an operation, to have that operation performed. I would like, if possible, that an additional doctor examine him, one in addition to the doctor who has already examined him, to see whether or not an operation needs be done now, or, as initially indicated, at a later time.

There has been evidence before me that he is in pain and that he has not been able to get medical treatment because of the insistence of his being in court. So, please, just see that whatever medical attention can be marshalled is marshalled. Whether or not he has been convicted has nothing to do with it. He may go to jail for a long, long time or a short time. I don't know what is going to happen. Right now something should be done about it, and I could not depend upon a more dependable person that you, Marshal.

THE MARSHAL: Yes.

MR. AMOROSA: Very briefly, let me make some final remarks regarding our proposal to remand all of the

defendants aboutwhom I have spoken. Our experience, that is, my office's experience in narcotics cases involving individuals who have not even been convicted regarding possible flight in those cases is horrendous. In this case we are talking about major narcotics traffickers after conviction. We ask your Honor to take that into consideration. Based on my representation that we have had a terrible experience in assuring the presence of individuals who have nowhere near the culpability of the defendants in this courtroom, of assuring their presence at trial prior to conviction, let alone subsequent to conviction, we ask your Honor that these defendants be remanded.

THE COURT: Have you covered all of the defendants?

MR. AMOROSA: The only remaining defendant is Chapman, on whom the jury was hung, and I would imagine Mr. Chance will have a motion for a mistrial?

MR. CHANCE: Your Honor, the Assistant did not ask for the remand of Chapman. I would like Chapman to remain in his present status until probably Monday, when I would like to make a motion in Chapman's case.

MR. AMOROSA: Chapman was not convicted in this case, so we did not ask to remand him. Mr. Chapman can make his motions on Monday or Tuesday of next week.

THE COURT: You just join the others within the

time specified by the rules of the Court to make any motions on behalf of your client?

MR. CHANCE: However, I would like to ask continuance of his bail.

MR. AMOROSA: We have no objection.

THE COURT: So ordered.

MR. AMOROSA: Is Mr. Chance asking for a ruling of a mistrial on Count 1 as to Mr. Chapman?

THE COURT: I don't want to consider any such motion right now. If he has any motions, let him put them in writing, just the way the other attorneys are going to do it. With regard to the verdict of the jury, I see no reason to dispose of that right now. Do you?

MR. AMOROSA: Yes, I do.

THE COURT: Why?

MR. AMOROSA: The Court should enter a judgment that there was a mistrial, and the jury was unresolved with respect to Count 1 on Chapman. I think that is necessary at this time, your Honor.

THE COURT: Why can't that be done next week? Why can't everything that Mr. Chance wants to do with respect to the jury verdict be resolved at that time? Why now?

MR. AMOROSA: What Mr. Chance is thinking, he desires in all probability to file a motion dismissing

the indictment against Mr. Chapman next week, dismissing Count 1 against Mr. Chapman.

As Mr. Epstein indicated earlier, the only thing the jury said with respect to Chapman is it had not made up its mind.

THE COURT: I don't need any of that A, B, C from you at this time. It is almost 1 o'clock. I am asking aquestion: Why do I have to make that order now, right now, right this minute?

MR. AMOROSA: Because, Judge, otherwise the jury will have no verdict with regard to Chapman.

THE COURT: All right.

MR. CHANCE: I am afraid to participate in this discussion, because he is telling you what you should do, so I don't know what to say.

THE COURT: I will just direct that the matter be held in abeyance until counsel have had an opportunity to decide what counsel wishes to do with regard to the motions or applications addressed to the verdict.

If you want an order to be entered as sought by the government, that is easy enough. What other relief is sought we will consider, but I don't see any need to press it at this time.

What else?

MR. AMOROSA: That is all I have.

THE COURT: There is no question, and it is fundamental, that up to the time of the rendition of the verdict of guilt, each defendant had the presumption of innocence in his favor. I emphasize that to the jury. You heard me. I banged away with it, because the law demanded that the Judge should make that overwhelmingly clear. I emphasizedalso that the indictment was merely a charge, et cetera, et cetera. That stage has passed. That is fundamental. I did not find these people guilty; that was not my job. They were found guilty by a jury. The jury concluded that after instruction by the Court. The presumption of innocence no longer prevails. So that talking about the appearance in court up to now is one thing. It would be material when a man is arrested, no matter how serious the charge, with the presumption of innocence in his favor, to consider bail. One has nothing to do with the other. It is like comparing deep therapy by a doctor to an operation. The patient had been treated with deep therapy, and now he is being wheeled into surgery, two different propositions.

I talk so that these defendants will understand, and I talk to them so that they will appreciate the efforts of their attorneys, who have advanced almost everything

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conceivable under the circumstances.

I know what this means to the defendants when the jury says "Guilty."

I need nobody to talk to me about that. I have seen it all my years.

But the law is the law and it is supposed to be administred with humanity and with understanding, and I would like to feel it is the criteria that I apply.

But in the spirit of speaking openly and fairly, and not running away from something that I hate to speak on because it is terrible, I have got to speak out and tell you it has been a long time since I heard evidence so powerful as to iniquitous behavior. The jury heard it and chose to believe it.

But to say that this is a small thing and not get yourself excited about it, if I said that, I ought to be chased off the bench. I might as well call it, as I told the jury to do, to call it as I see it. I have tried thousands of cases and sentenced tens of thousands of people in my time, and like a doctor I have got a right to say this is one of the worst cases I have ever had. The burden on the lawyers was enormous, enormous, enormous, enormous. I know the significance and the applicability of Section 3148. I know the criteria, or, at least, I feel I do,

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that should govern my actions. I feel constrained to deny each and every application advanced on behalf of each defendant. I direct that each defendant be remanded for sentence on December 3rd; I order a full investigation, a police investigation, a minute investigation with regard to each defendant be made available to the Court at least five days before the actual sentence, December 3rd, at 10 o'clock in the courtroom specified in the Law Journal.

That is the order of the Court with respect to each defendant.

I thank counsel again for their cooperation with the Court and I direct that we adjourn court at this hour, a couple of minutes after one, until next Tuesday, because Monday is a holiday, adjourned to October 28th at 10 o'clock a.m.

So ordered.

MR. [illegible]: Are you instructing us to return Tuesday morning at 10 a.m.?

THE COURT: No. I am just adjourning court, my court until Tuesday.

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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Michael Mardinen

Murray Dentsch

Official Court Reporter
U. S. District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, :

vs. : 75 Cr. 687

FRANK LUCAS, :

Defendant. :

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January 27, 1976
3:10 p.m.

BEFORE:

HONORABLE IRVING BEN COOPER,

DISTRICT JUDGE

APPEARANCES:

DOMINIC F. AMOROSA, ESQ.,
Assistant United States Attorney

JEFFREY HOFFMAN, ESQ.,
Attorney for the Defendant

MR. AMOROSA: The Government is ready, your Honor.

MR. HOFFMAN: The defendant is present, your Honor.

THE COURT: Is the defendant ready?

MR. HOFFMAN: If it please your Honor, there are two matters that I would like to mention to the Court. The first is that I just received from the prosecutor, and still have four pages left to read, his answering papers on the motion. The second matter I would request of the Court is an opportunity to see the presentence report. The reason I make the request now is because I'd want to do it so that Mr. Lucas has an opportunity to go over it with me in case there are any matters in there which from his personal knowledge will be refuted, which I couldn't do, since he has been incarcerated, without his presence.

For those two reasons, I would ask the Court's indulgence.

THE COURT: Application granted. You finish reading the Government's reply affidavit, take it up with your client, and I hand you, pursuant to your request -- which is something unusual for me, but the serious nature of the sentence warrants it -- I'm turning over to you the probation report which you may read and consult with him on,

and then we will call the case again.

MR. HOFFMAN: Thank you, your Honor.

THE COURT: That will be this afternoon, you understand.

MR. HOFFMAN: Yes, of course.

THE COURT: Will the marshal be good enough to let counsel and his client have an opportunity to confer.

(Short recess taken.)

THE COURT: Mr. Hoffman, you have read both the reply in the papers by the Government to your application and the probation report, is that right?

MR. HOFFMAN: That's correct, your Honor.

THE COURT: What is there that you wish to say, if anything, with regard to the motion other than what the papers reveal?

MR. HOFFMAN: If it please your Honor, as the Court is aware we submitted a motion to recuse, and papers were served on us which the Court gave me an opportunity to read today responding to that motion.

If I may, your Honor, briefly elucidate the following:

The basis for that motion --

THE COURT: Excuse me, Counsel. I intend to

read the motion papers and I so order that your motion and the reply of the Government are to be copied word for word by the court reporter into the report, so there is no sense in repeating what's already before me.

MR. HOFFMAN: Thank you, your Honor Trying not to repeat it if the Court will bear with me briefly I would just, in view of the serious nature of the proceedings and the serious liability faced by my client, I would merely like to tell your Honor the following: That the true basis in filing the motion is the fact that this Court sat through two trials, the first one for which Mr. Lucas is presently before your Honor for sentencing, the second one in which Mr. Lucas was ultimately acquitted. In that case there were numerous conferences with the Court on the record wherein in various areas the prosecutor alleged illegalities and improprieties by Mr. Lucas. Many of those allegations concern threats to witnesses, allegations by the prosecution certain witnesses have disappeared, in their opinion disappeared as a result of Mr. Lucas' actions. In fact, one witness who testified before the Court as to an incident wherein he was shot, the allegation being that it was as a result of an individual on trial who was alleged to be a lieutenent of Mr. Lucas, and under Mr. Lucas' direction, and whose testimony as to that area the Court

ultimately struck from the record, and I believe correctly so, on the grounds that it was so prejudicial that the jury would be so tainted by such evidence as to make it difficult for them to make a fair determination and a fair decision on the merits of the case.

I think the essence of our motion, your Honor, is that the same thing holds true for this Court, that when so much matter came before your Honor that would not be befor your Honor if you were the trial and sentencing judge on just the one case which Mr. Lucas was convicted of, that it is almost humanly impossible to clear one's thoughts, consciously or subconsciously, of all this additional matter. I believe the prosecutor at one point in time alleged to the Court that he felt that there had never been in the history of the Southern District a case with as much bloodshed or alleged bloodshed as his belief with what was put forth to the Court.

I believe your Honor responded that it was quite unusual and the allegations were among the worst that your Honor had heard. With all deference and respect to the Court, I think it becomes almost impossible for any human being, as I said, or for us to expect any human being to be able to take all that away from his mind, forget that he heard it and say, "I'm judging this man based upon

one conviction and the presentence report as I see it, and I forget and ignore the rest."

Because of that difficulty, we are asking the Court to recuse itself and allow another judge who could read through the record of the first trial so that all he sat on would be the information before him and a presentence report such as your Honor has and as the courts get in every case and make a determination as to sentence based on that without having all the additional matters having brought before him and a difficult, if not impossible, job of trying to put those matters aside.

I think as a matter of fairness to the Court and to the defendant we strongly press our motion in this matter. I very much appeciate your Honor's allowing me the opportunity to briefly expand on it.

THE COURT: Before I call on the Government, let me just say to you that in 36 years of judicial service on these two blocks which include this courthouse, I don't remember a more serious involvement than Lucas'. Let's understand each other on that. This was a day to day operation over a period of years, the sale of drugs in large amounts, the like of which I had never witnessed, for cash. It's always been my understanding, and that is the law as I understand it, that the sentencing judge should

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inquire from all credible sources with regard to the defendant concerning whom sentence is about to be imposed. The judge should look into the good as well as the bad. The judge should even examine into a case where the defendant was acquitted and pick out such material as recommends itself to the scrutiny of the sentencing judge.

I am amazed at the comment that the judge is confined on sentence to the disclosures of the particular trial or plea before him. Very, very often I have found in my judicial experience that the instant case, or the case on trial, or the case where there is a plea, may reflect the least of the culpable acts by a defendant. On the other hand, they may very well demonstrate the maximum of the culpability or the venality of the offender.

Then, too, it has always been my policy to listen to anyone who has anything good to say concerning a defendant. Heaven knows we get plenty of information about how bad he is.

So I must label as totally incorrect the positive pronouncement by counsel that the judge is prohibited from or that he is prejudiced by looking into the past deportment and the indications of the deportment in the future of a defendant who is to be sentenced.

Let's hear, however, from the Government. What do you wish to say, if anything, with respect to the motion that is before us?

MR. AMOROSA: Just briefly, your Honor, our response is incorporated in our papers with which you are thoroughly familiar.

First the motion is untimely as a matter of law, and we submit that this Court doesn't even have jurisdiction to accept it because it is untimely. Just assuming it was timely, it is still faulty as a matter of law, Judge, under the authority which states categorically that the alleged bias or prejudice of the judge must come from a source which is extra judicial, that is, it was not presented before the judge in a judicial proceeding.

Everything that your Honor is aware of with respect to Lucas came before your Honor during the course of legitimate judicial proceedings in the Magnano trial and also in the Tutino trial.

Finally, although there are many representations in the moving papers by Lucas that you have a personal disdain or bias towards Lucas, there is not one citation in Lucas' papers in support of that allegation. Indeed, when one looks at the record of these trials, that is the Magnano trial in which Lucas was convicted and in the

Tutino trial in which he was acquitted, one sees that your Honor shows fairness to Lucas in all stages of the proceeding and made no disparaging remarks in respect to Lucas. That is the reason, your Honor, that Lucas did not put anything in his motion papers with reference to person disdain, because there is no reference in the entire transcript of these trials that shows a personal disdain or bias on the part of your Honor for this defendant.

Although it is understandable that Lucas makes this motion because your Honor is aware of the depravity of this man's conduct, we submit that there is no basis in the law for your Honor to recuse himself from this case.

We further submit that your Honor has an obligation not to recuse himself from this case because your Honor is familiar with all the facts, all of the background with respect to this defendant, and your Honor is in a position in which no other man is at this time to sentence this man and impose the proper penalty.

That is all we have to say with respect to the motion.

THE COURT: To be exact, Madam Court Reporter, I want, in order that the record be complete, you to copy word for word into the sentencing record the papers, including the notice of motion by Mr. Hoffman, the affidavit

of Frank Lucas in support of that motion sworn to the 19th day of January, 1976, the affidavit of Jeffrey C. Hoffman, verified January 20, 1976 and even the attached copy -- no, I don't think I ought to do that. That's too much work and unnecessary. There is attached a copy of the complete indictment in the Magnano case. Do not copy the indictment.

I hand those papers to you right now. They are to be returned to the clerk. In addition, you will copy right into the record the answering affidavit of the Government by Assistant United States Attorney Dominic F. Amorosa, and why he didn't see fit to number his pages I don't know. But, at any rate, it consists of 23 paragraphs and was sworn to the 26th day of January, 1976 and I hand it to you now. Thank you.

The motion is denied. We should say now, too, since it might be argued that the judge said nothing when he was accused of bias, I state on the record that we entertain no such reaction whatever. We look upon this as one of the ugliest duties that a judge must perform. If I could avoid it, I would avoid it. I don't know of anything that is more unpleasant, When a judge comes to a sentence it's always been the most disheartening experience that comes to a judicial officer. A duty must be done. You

can't avoid it. If a judge can't take it, he should step off. That unpleasant duty must be assumed and it can't be delegated to anyone else.

Sure Lucas doesn't want the judge to know the extent of his misdeeds. No one likes that. It piles up and then there are some more, and when you look here there is still additional material. Wherever you look there is a saturation of iniquity. Lucas knows that. Lucas has a keen mind.

One of the saddest things about sentencing is to so often behold a man with physical and mental prowess that he has thrown to the winds and substituted callousness, ruthlessness on end. What should I do with it? Say it doesn't exist? Close my eyes to it, devaluate it?

Counsel wanted to see the probation report. I let him have it. Usually I deny the application. As an exercise of discretion, I think it would be unfair to the sources from which much information is imparted, but the nature of this case is such that I am willing to make an exception, and since I have made an exception, I direct the court reporter to copy every word of the probation report into the record.

Our Court of Appeals recently found occasion to say something that is particularly pertinent. I say it

with sadness, because Lucas was the one that the Court undoubtedly was thinking of. The victims, the legions of miserable creatures, many of them affected for the rest of their days, weak willed who have succumbed to the product that Lucas trafficked in day in and day out. I ask your indulgence. It's the Bynum case.

Would you see if I left the sheet inside and if not would you get the opinion for me right away?

W CLERK: Yes, sir.

THE COURT: Let's go on. I will come back to it. I am getting a copy of the words that I feel are most apropos and I am sorry that I have done something that I always regard as inexcusable, and that is not to bring all the papers that are pertinent.

The Government in a memorandum which we endorse found occasion with respect to this sentence to say the proof at trial estabilised that Lucas was the major heroin customer of Perna, Verzino and Malizia. The testimony implicated Lucas in the receipt of approximately 100 pounds of heroin and four pounds of cocaine from Perna, Verzino and Malizia for which Lucas paid approximately $900,000 in cash.

It also established that Lucas controlled an organization which is one of the largest, if not the

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largest, street level distributor of heroin in New York City during the year 1973. Frank Lucas, like the other convicted defendants, has been a major figure in heroin trafficking for years in the New York metropolitan area. He has already been convicted in Federal Court in this district on one occasion for this activity.

Frank Lucas has also been convicted in the State of New Jersey for a firearms violation pursuant to which he is currently confined. The wealth that he has accumulated over the years from this major narcotics trafficking could not be overestimated. The seizure of approximately $585,000 in cash from his home in January of 1975 is only a small refection of the fruits of this man's operation in narcotics. Proof was adduced at trial showing that Lucas is the president of a corporation in the State of North Carolina which was able to obtain a mortgage in the approximate amount of one half million dollars.

Now, that gives a general view of the seriousness of this case. Does the Government wish to say anything over and above what the Court has just placed upon the record?

MR. AMOROSA: Yes, we do, with your Honor's permission.

Very briefly, Judge, it's only on a rare

occasion that the People of the Southern District of New York have before a federal district court judge on a day of judgment a violator of the significance and quality of Frank Lucas. As your Honor said, he was found guilty on October 24 of last year, 1975, on four counts of narcotics violations. He is a second offender, having been convicted in federal court in approximately 1960 of a federal narcotics violation. He faces 30 years on each count here with a $50,000 fine.

The evidence in the Magnano trial was mind-boggling. Lucas was the major heroin customer of Perna, Malizia and Verzino, received approximately 100 pounds of heroin from that organization in 1973, and as your Honor indicated, paid those people approximately $900,000 in cash.

We ask your Honor to consider this proof in imposing the appropriate penalty. We also ask your Honor to consider the proof adduced before your Honor in the Tutino trial, in which Lucas was acquitted, and for that proposition we cite to your Honor United States against Sweig, 454 F. 2d 181, 183 and 184, (2d Cir. 1972) recently reaffirmed by United States against Hendrix, 505, F. 2d, 1233, 1235, (2d Cir. 1974) which permit a court in this court's position to consider evidence which resulted in an acquittal when determining the appropriate penalty.

The proof in these cases, Judge, both the Magnano case and the Tutino case, in either one of those cases, establishes beyond all doubt that Frank Lucas is a professional criminal and a major narcotics dealer of unprecedented proportions, and that he is a man of almost unbelievable viciousness who, of course, has no respect for the laws of our country, or the feelings of his fellow human beings.

We ask your Honor for a sentence that will act as a general deterrent, one which will put people on notice who have not made up their minds as to whether they want to become involved in narcotics trafficking, that if they do so there will be a reward in it for them commensurate with their crimes. We ask your Honor to also impose a sentence on this defendant which will act as a personal deterrent on him, a sentence which will prevent Frank Lucas from taking additional victims and adding those victims, your Honor, to his already terrible toll.

In conclusion, Judge, we just want to read to you what you said in the sentencing of Lucas' co-defendants. It's very brief, and I would like to take this opportunity to read it. It's page 55 of the sentencing transcript of the other defendants in this case who were sentenced on

December 4th, 1975 by your Honor.

"What do I say to the decent human beings in the community who are eking out a livelihood and who have to deny family this, that and the other, which family would like to have because there isn't enough money to take care of it? What do I say to them when they want to know what are we doing about those who are corrupting the neighborhoods with drugs and the other horrifying events that ensue from this plague?

"Haven't they a right to a voice too? Shouldn't they be heard to declaim this and to say that it is the pollution that makes the atmospheric pollution almost a joy by comparison."

We ask your Honor to impose a sentence which speaks for and for the community upon Frank Lucas, Judge, and to stop him, Judge, as another judge wasn't able to stop him in 1960 from distributing heroin.

That's all we have to say.

THE COURT: Before we hear from Mr. Hoffman and Mr. Lucas, I would like to apologize.

The opinion that I was seeking before was among my papers, and I apologize to my law clerks for bothering them. It was right here all the time. Let me read it.

This is from the United States against Bynum, 485 F. 2d 498 (2d Cir. 1973):

"The (defendants) here were engaged for profit in a major hard drugs venture in Harlem which not only dehumanized its ultimate customers but unquestionably spawned myriad crimes in a community already misery-ridden. No jury in New York can be unaware of the dimensions and consequences of the major operation which was graphically portrayed here.

"The revulsion of the average citizen to this traffic need not be documented. We are not dealing with minor league addicted street pushers, but with well-financed, brazen professionals engaged in a large scale criminal undertaking in which corruption and violence are endemic.

"The euphemistic description of these activities as transactions in contraband does not disguise the true nature of the wicked alliance here established."

I should also add, Mr. Hoffman, that in denying the motion which you brought on, that we spare ourselves this unpleasant happening. I may very well find time to write on the determination to deny the motion either a memorandum or an agreement which in due time will, of course, be considered a part of this total sentencing

procedure.

Now, Mr. Hoffman, the floor is yours.

MR. HOFFMAN: Thank you, your Honor.

I would ask your Honor before I begin whether or not, other than the words that your Honor read to us from what appeared to be a previous document by the government to the court, if there were any other materials supplied to your Honor concerning Mr. Lucas that we are unaware of as to the sentencing.

MR. AMOROSA: Judge, I object to that. Counsel were given a copy of the sentencing memorandum which we submitted to the Court when we originally submitted it to the Court. That was prior to the December 4th sentencing. Copies were sent to all counsel in the case, and, of course, other counsel referred to the Government's memorandum at the time that their clients were sentenced.

MR. HOFFMAN: I meant other than that memorandum.

MR. AMOROSA: I'm sorry. I apologize.

THE COURT: I don't know that you have the right to ask it, but I have no hesitancy to answer that the materials that we had mentioned comprise all the materials on about which we base our determination.

MR. HOFFMAN: Thank you, your Honor.

If it please your Honor, firstly I would like to briefly respond to some of the statements made by the prosecutor. I guess this is just a difference in philosophy, but I think, when I say just a difference in philosophy, I think it is a philosophy by which this country runs and the courts run and the criminal justice system runs, a philosophy that tends greatly towards determining how our entire society reacts.

As to the first two matters that I would like to speak to, I'd ask the Court not to consider those matters brought forth by Mr. Amorosa; to wit, alleged evidence or statements made in a trial, the trial in which Mr. Lucas was acquitted.

The reason I ask that is the following:

Firstly, that the cornerstone of our system of justice is that an individual is presumed innocent until proven guilty. As the Court--I am sure many times and in my presence--advised the jury that presumption remains with the defendant right up until the time and through the time of the jury's deliberations, and only falls when and if and until the jury determines that there has been sufficient evidence adduced to convince them beyond a reasonable doubt of the guilt of the defendant.

In view of the fact that we went through a

seven and a half or thereabouts week trial, and Mr. Lucas had the presumption of innocence, as is constitutionally mandated, in his favor throughout the trial and, in fact, was acquitted and found not guilty by the jury, I would think that going along with our constitutional requisites that the Court should not hold anything against Mr. Lucas that came out in the trial wherein he was presumed innocent and ultimately found not guilty.

Secondly, I would like to strongly ask the Court to consider the fact that deterrence is only one factor of sentencing. I am sure I am not telling the Court anything that it hasn't heard before or considered before.

The reason I bring it up is because the Government so strongly in its statement talked about deterrence, and that's only one of a number of factors that courts and the Bar Association itself has set forth as the basis for sentencing. I think if the only concern were deterrence, that any time a person committed a crime it would be rather simple to go according to the rules of some of our ancient societies where if he stole you cut off his hands and therefore he can't steal anymore.

We have come a little further than that, I think, in our thinking -- or if he committed an act, you just either killed him or imprisoned him for the rest of

his life. Therefore you had complete deterrence.

I think that our society has moved upward in the ladder of civilization to the point where we don't look at deterrence as the total and only consideration in sentencing. We have gotten to the point where, although we are not perfect and although our institutions aren't perfect, our philosophies at least , the goals to which we strive, are the hope that if an individual has committed a crime, is found guilty of committing a crime, then we have to try and make a blend within the system of deterrence, but also of one not totally taking the human life that is before the Court and just eradicating it, saying there is no good possible in it, so we eradicate it. I think our society has asked us not to do that.

Secondly, our judicial system has also come to the point of saying we blend the deterrence with the thought I just expressed and with also the thought of rehabilitation. There are some rare, rare instances where if a person is convicted of certain heinous crimes under certain circumstances that the death penalty is still imposed, although the Supreme Court has ruled that that was in many instances not a constitutional mandate. There are still some areas where there has been no definitive decision. That's not the situation here, and when that was

the situation in some states prior to being found unconstitutional, it was only in those situations where, in essence, the decision was that there is no value left in this life and so it could be taken.

Your Honor has before you a 45 year old man, Actuarially I guess for his generation it's assumed that he would life until the age of maybe 65 or 70, as far as the actuary tables. That means that there is approximately 20 years to the best that we could know -- none of us have crystal balls -- that this man could look forward to, assuming he is in relatively good health.

The question becomes, I think, for the Court: How does the Court balance punishment, deterrence, the fact of rehabilitation and the fact that we have not regressed to the point under our laws of extinguishing any hope that a living human being has some good in him that he should be left able to use. I think it's a terribly difficult job for the Court, and it is a job, however, that has to be done.

As the Court is well aware, Mr. Lucas suffers from osteomyelitis in his left hand. I am not a physician. The first time I heard of osteomyelitis is when I believe it was Mickey Mantle's father died from it. I believe it's a type of slow degenerative bone cancer. I don't know.

I haven't had any reports as to the prognosis of this disease with Mr. Lucas. When I say the prognosis, as the Court is aware from the probation report from matters that occurred during the trial, he has had a number of operations on his hand. The disease still exists. He probably will have another operation this spring. We don't know what will happen with the disease, but whether or not it will shorten those proposed 20 years the actuarial tables tell us about this is only something that we could conjecture about. Right now we don't know.

Mr. Lucas grew up in a very poor household, black, in the South and he didn't just go out and sadly live his lot without trying to do something for himself. He worked as a youngster from the age of 15 or thereabouts until he was 18 years old as a houseboy earning, I believe, some ten or fifteen dollars a week. It wasn't very much. It was in essence the work of a servant. But it was what he could get, and instead of choosing nothing, he chose to do whatever he could, regardless of how demeaning or how ill-paying. I think at least up until that point in time it gives us some thought and some idea that there was some worth in him at the time, something that made him do the best he could, whatever that was, with his fourth grade education.

He thereafter came to New York, and unlike, I am sure, many people who appear before your Honor convicted of equally heinous crimes, he had a substantial number of jobs in New York. He worked for a number of years in the construction industry. I won't belabor the amount of time with the years, because it's in the presentence report. There is no question of the fact that Mr. Lucas has twice been convicted of dealing in narcotics. The first time he served a substantial period of time in the penitentiary for, I believe, some five or six years. When he came out, unlike many of the people who I am sure your Honor has had before you, he didn't immediately turn to narcotics just as we saw some of his co-defendants. The evidence was that while they were in prison they were plotting narcotics crimes and upon coming out they immediately went back into it.

He again tried at least the best he could to earn a living for himself and for a vast family which, through the years, he had acquired both from his marriages down South and marriages up here as in the presentence report.

He worked again in the construction industry for about three or four years, physical labor every day, sweating to make what he could for himself and for the

people he had to support, and as the probation and presentence report does indicate, he always contributed whatever he could to his two daughters down South and to his progeny in the North.

His son is now 15 years of age who he has always looked after, has brought up, who has never been in trouble and is going to school and getting a decent education, and thereafter his three year old daughter who he presently has.

Obviously, at some point in time during or after those three or four years when he went to work after getting out of the penitentiary, as the case before your Honor showed, in the early 1970's he became again involved in narcotics. There is no way to stand before this Court and try to minimize the involvement nor rationalize it as unimportant or as a minor crime. I merely try to point out to your Honor that there were various periods in his life when he did the best he could honestly and laboriously for himself and his family as compared to and as opposed to others who never have.

During the period of time from the early 1970's until the present, the evidence is shown that Mr. Lucas was engaged in narcotics activities and he was convicted of that, and that's why he stands before your Honor.

For that I know that your Honor must impose a punishment which includes deterrence, and hopefully rehabilitation.

I would ask your Honor again to think of the sentence in the blend that it's supposed to be, not just deterrence proposed by the Government and certainly not just leniency as perhaps any defendant would like, or any defense lawyer would ask for. But the very blend that is necessary, and that very blend should be a personal one because this is a 45-year-old human being before your Honor.

Your Honor might sentence a 20-year-old differently and he might sentence an 80-year-old differently and well your Honor probably should. Again, I don't think it should be a blanket kind of thing as I thought was proposed in the Government's statement, but that it should be based on the 20 or so years, active years, important years, left to Mr. Lucas.

I am sure Mr. Lucas' 15-year-old son, and I am sure Mr. Lucas' 25-year-old twin daughters and 3-year-old daughter, if they could express it, would not tell your Honor as the prosecutor did that he has no respect for the feelings of fellow human beings. I am sure that at least those human beings would say that he has been a conscientious father who has been constantly in touch with all of them, and as to his two youngest, 15-year-old son and 3-year-old

daughter, has in fact been a very doting father.

Regardless of his manner of life, deeds or misdeeds, he has striven very, very strongly to make sure that they led as proper and forthright and intelligent lives as possible. I can tell your Honor from personal experience that his son, through his father's very strict guidance, is an excellent student, a boy who has never gotten into trouble or had any problems and has been under very strong and strict guidance of his father.

So, as opposed to Mr. Amorosa's position which would take this human being and say there is no good in him, there is no care about other human beings in him, period, I think again that your Honor has to see that there is a balance, and that although the acts of which he was convicted may have been injurious to others, without minimizing that, it is not the same as perhaps those people who have been before your Honor who were totally injurious, who had families they couldn't care less about, never went near them, never had any need for them, never tried to support or guide them in any way.

I think those distinctions are important to make when the Court is considering a single human being that is before it and not just another sentence or a deterrence alone. Other than that, I thank your Honor for the

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opportunity of addressing the Court.

THE COURT: Lucas, you have an opportunity now which the law provides for you to say anything that you wish before sentence is imposed.

THE DEFENDANT: Yes, sir.

Judge, I am not a lawyer or nothing like that. I don't know what you have been talking about when you are talking about 100 pounds of drugs that I distributed over the neighborhoods. I don't even know these gentlemen. They drag me in here from another prison over here, put me in another case over here. I don't even know the people.

I met Perna two years ago in West Street. He asked for a telephone number or something. I gave it to him. I had it over here. You are telling me about the case I was just acquitted on. I don't even -- I don't even know what to say. I don't know how to say it. I don't know what to do. I do know this. I haven't sold no drugs to nobody.

The way I got my plantation, it's all in the probation report. I got it from people, through legitimate people who helped me to get it. I went into a bank to borrow the money to buy the place. It had nothing to do with drugs or nothing like that.

Thank you.

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THE COURT: We have already indicated the enormity of the challenge so that counsel could address themselves to it, so there is very little that remains to be said.

Of course, it goes without saying that because a judge wears a robe does not mean that he is unfamiliar with the trials and tribulations of life. My own misery as a boy, I haven't seen much like it other than in those who were physically maimed. I washed dishes. So Lucas helped in another way. I sold goods on the road. I worked on a farm. There were sixty-odd jobs I did by the time I was ready to be admitted to the bar.

Going down the street only three blocks from the school I was mugged because of my religion, and I had to walk pretty near a mile and a half to avoid having my head handed to me.

The misery, the persecution, going down to the railroad track and picking up pieces of coal that fell from the moving railroad cars in order to keep a potbellied stove going. You are telling me what it means to be hoffified each and every day and not knowing when you were going to each and where you were going to live? You tell me about Lucas' children, and I am supposed to close my eyes to other children who also want a chance for their

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place in the sun. What about what Lucas did to them? They are loved by their parents, too.

Counsel seeks reformation. I tried to employ that all the years of being a judge where that is indicated. It is stupid. It is the nth degree of ignorance to write a prescription for an ailment that one knows is absolutely devoid of remedy.

Here there isn't even a grain of contrition, not even the very fundamentals that must be in evidence before an approach of that kind could be attempted. I think I have a right to say that my own attitude in sentencing has always reflected, as I surmise it does here, that as with guilt each sentence is personal, and that is what makes it a torment that one has to read and reread, and march up and down the floor, trying to figure out what is fair to a defendant and what is fair to the community alike.

We have a second narcotics offender here. The maximum on one count is thirty years and a $50,000 fine. If this Court were devoid of any sensitivity whatever to the possibility that even the most wickedly entrenched and corrupt and ruthless creature could still rise, we would mete out four times thirty and four times $50,000.

There is no sense in reciting what is revealed

in the probation report. It's already been made a part of the record. There is very little in it that helps the defendant. I have looked here and there for that which could somehow offset the totality of the iniquity that is before the Court and with which the Court must deal.

Stand up, Lucas.

The sentence imposed by this Court is as follows:

On count one, the defendant is sentenced to 20 years plus $50,000 fine. On count five, 20 years and $50,000 fine. Those two sentences on counts one and five are to run concurrently.

Count six, we impose a sentence of 20 years and a $50,000 fine. Count seven, we impose a sentence of 20 years and $50,000 fine. The jail commitments in counts six and seven are concurrent. However, the sentences imposed, the jail sentences imposed in counts six and seven are to run consecutively and not concurrently with the sentences imposed in counts one and five.

The fines, however, are not in any way to be diminished, so that it is the intention of the Court to impose a sentence of jail totalling 40 years and a fine of $200,000.

Lucas, under the law you have a perfect right

to appeal from the verdict and from the sentence. In the event you shoul find that you are unable to retain counsel you will make your application to the appropriate court and counsel, with warranty by the application papers, will represent you without charge.

Your lawyer now is Mr. Hoffman. He must remain by your side on the appeal unless the Circuit Court of Appeals allows him to withdraw. You must file a notice of appeal within ten days from this date, and I take it, Mr. Hoffman, that you will see to it as your professional duty in order to protect the rights of your client that before those ten days expire you will file the appropriate notice of appeal.

Unless I have omitted anything, or not made clear what I have said I afford each side an opportunity to speak up. Does the Government --

Oh, yes, I neglected to add that in addition to the sentence imposed, the law commands that I add six years special parole. That is mandatory and must be added on to the sentence already announced.

Has the Government anything to say or any question to ask?

MR. AMOROSA: Yes. We ask the Court to order that the fine imposed on Lucas totalling $200,000 be

committed fines.

THE COURT: They are committed fines, by all means.

MR. AMOROSA: We have nothing else.

THE COURT: Mr. Hoffman, is there anything that you wish to make clear?

MR. HOFFMAN: Nothing at this time, your Honor.

THE COURT: Very well. Will you announce a recess, Mr. Clerk.

(Court recessed.)

(Pursuant to direction of the Court (see p. 9, l. 22 through p. 10, l. 4) the following papers are copied into this record:)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- v -

IND. #S75 Cr. 687

JOSEPH MAGNANO, et al.,
For
FRANK LUCAS,

NOTICE OF MOTION

Defendant.

----------x

SIRS:

PLEASE TAKE NOTICE, that upon the annexed Affidavit of the defendant, FRANK LUCAS, Certificate of Good Faith of Jeffrey C. Hoffman, attorney for the defendant, and all other proceedings heretofore had herein, the defendant will move before the Honorable Irving Ben Cooper, United States District Judge for the Southern District of New York, at the Court House located at Foley Square, New York, New York, at a time and place to be designated by said Court, pursuant to Title 28, United States Code, Section 144, to recuse the Court from sentencing the defendant FRANK LUCAS.

DATED: New York, New York
January 20th, 1976

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YOURS, etc.,

JEFFREY C. HOFFMAN
Attorney for Defendant
Frank Lucas
30 Broad Street
New York, New York 10004
(212) 944-1550

TO: Hon. THOMAS J. CAHILL
United States Attorney
Southern District of New York

Clerk of the Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

- v -

IND. NO. S75 Cr. 687

JOSEPH MAGNANO, et al.,
For
FRANK LUCAS,

Defendant.

AFFIDAVIT

----------x

STATE OF NEW YORK)
ss.:
COUNTY OF NEW YORK)

FRANK LUCAS, being duly sworn, deposes and says:

1. I am a defendant presently awaiting sentence on Indictment number S75 Cr. 687 before the Hon. Irving Ben Cooper.

2. I appeared before Judge Irving Ben Cooper as a defendant in two cases in which I was charged with conspiracy to violate the federal narcotics laws and various substantive violations of said laws, and with a violation of Title 18, U.S.C. Section 848 (Continuing Criminal Enterprise).

3. The first trial began on or about September 24, 1975 and ended in my conviction on all counts. The second trial began on or about November 10, 1975 and resulted in my acquittal on all counts.

4. The purpose of this Affidavit is to have another Judge impose sentence upon me in view of all the prejudicial matter which was developed before Judge Cooper during the second trial, above mentioned, and because during that trial Judge Cooper, with all due respect, evidenced a bent of mind demonstrating he is personally biased against me.

5. In the first trial in which I was convicted, the evidence offered by the government against me alleged that I had engaged in narcotics activities, to wit, the purchase and distribution of narcotics.

6. In the second trial above mentioned, although the charges contained in the indictment alleged narcotics violations, the following was indicated to the Court by the government:

(a) I was responsible for or in some way connected with the murder of various individuals including George Ford.

(b) It was alleged that Marion Knuckles was a lieutenant of mine and that he was responsible for the shooting of one Coy Smith, who was a government witness in the case.

(c) The government stated to the Court in words and substance that in this case there was

more bloodshed than in any case that they were aware of that had been prosecuted by their office.

7. The Court on various occasions also stated that it was very concerned with the revelations of the government concerning what appeared to it to have been a great deal of bloodshed surrounding this case.

8. Most of the allegations concerning the above mentioned activity were leveled at myself.

9. The Court heard witnesses testify that I was substantially involved in the distribution of narcotics and although I was acquitted, this testimony could not help but create a personal bias and prejudice in the Court over and above those matters which it heard in the previous case.

10. The government related to the Court that the reasons that one of the witnesses in this case, Mr. Carlos Schuster, testified, was his belief that his wife and family were in imminent physical danger from myself, and this adds to the already prejudicial material above stated which came before the Court. Additionally, there was evidence adduced through witnesses' testimony that I had dealt in narcotics from my home, such evidence not having been presented at the prior trial and which would have to prejudice the Court when said Court knows that my home is occupied by my wife and young child.

11. The Court itself indicated on occasion that it was most concerned with the welfare of witnesses and their families, and in so doing, the Court clearly evidenced a personal animus toward me.

12. The Court additionally showed its disdain and resentment for me by refusing to hear my application to represent myself and discharge my attorney, and by refusing to even hear me on the record on this matter.

WHEREFORE, it is respectfully requested that this Honorable Court recuse itself from imposing sentence upon me.

/s/ Frank Lucas
FRANK LUCAS

SWORN TO BEFORE ME, THIS
19th day of January, 1976

/s/ Gino E. Gallina

GINO E. GALLINA
NOTARY PUBLIC, STATE OF NEW YORK
NO. 1364700
Qualified in Westchester County
Commission Expires March 30, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

- v -

JOSEPH MAGNANO, et al.,
For
FRANK LUCAS,

Defendant.

IND. NO. S75 Cr. 786 IBC

CERTIFICATE OF GOOD FAITH

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JEFFREY C. HOFFMAN certifies and says:

1. I am an attorney at law of the State of New York and a member of the bar of the United States District Court for the Southern District of New York, and I am counsel of record for the defendant Frank Lucas.

2. As attorney for the defendant, and pursuant to the requirements of Title 28, U.S.C. Section 144, I hereby certify that the within application is made by me on the basis of Mr. Lucas' affidavit, in good faith.

3. I further certify that after discussions with Mr. Lucas and examination of the transcript in U.S. v. Tutino, et al. (S75 Cr. 919), a copy of which indictment is annexed to his affidavit, and after examination of his affidavit, I certify that I believe that Mr. Lucas has made his affidavit in good faith, and not for the purposes of

postponement of these proceedings, nor in disregard of the facts as known to him.

DATED: New York, New York
January 20th, 1976

/s/ Jeffrey C. Hoffman
JEFFREY C. HOFFMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA

- v - AFFIDAVIT

JOSEPH MAGNANO, et al., S 75 Cr. 687 (I.B.C.)

Defendants.

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COUNTY OF NEW YORK)
STATE OF NEW YORK ; ss.:
SOUTHERN DISTRICT OF NEW YORK)

DOMINIC F. AMOROSA, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Thomas J. Cahill, United States Attorney for the Southern District of New York, and have responsibility for the prosecution of the above-captioned matter.

2. I submit this affidavit in opposition to the motion of defendant FRANK LUCAS dated and filed January 20, 1976, to recuse Judge Cooper from sentencing Lucas. Unless otherwise indicated, this affidavit is made on information and belief.

3. Though, contrary to Local Rule 9 (b), the motion to disqualify is not accompanied by any supporting legal memorandum, the motion is apparently made pursuant

to Title 28, United States Code, Section 144.* That section makes it plain that the motion is untimely and should not be considered. (See Point III.) In view of the serious nature of any claim of prejudice against a United States District Judge, however, the Government responds to the motion "on the merits". Even a cursory examination of the papers makes it clear that the claims of "personal bias or prejudice" are sham and frivolous, that the claims of prejudice are based on a complete misconception of the law, and that the moving affidavit is wholly insufficient as a matter of law.

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* That Statute provides:

> Bias or prejudice of judge
>
> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

I. The Facts

4. On January 15, 1975, Indictment 75 Cr. 24 (the "Magnano Indictment") was filed charging Joseph Magnano, Lucas and others with conspiracy to violate the narcotics laws, in violation of Title 21, United States Code, Section 846, and with various actual violations of the narcotics laws in violation of Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A). This indictment was, pursuant to the calendar rules effective in the Southern District of New York, randomly assigned to Judge Cooper for all purposes. Indictment 75 Cr. 24 was superseded on July 4, 1975, by Indictment S 75 Cr. 687. Trial on that indictment began on September 22, 1975 and on October 24, 1975, Lucas was found guilty on all four counts in which he was named.

5. On May 29, 1975, Indictment 75 Cr. 515 (the "Tutino Indictment") was filed charging Ralph Tutino and others with conspiracy to violate the narcotics law, Title 21, United States Code, Sections 846 and 173, and with actual violations of the narcotics laws in violation of Title 21, United States Code, Sections 848, 812, 841(a)(1), 841(b)(1)(A) 173 and 174. That indictment was not designated as related to the Magnano indictment, and at the time pursuant to the Southern District calendaring rules it

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was also randomly assigned, coincidentally, to Judge Cooper, for all purposes. On September 17, 1975, Indictment 75 Cr. 515 was superseded by Indictment 75 Cr. 919. That indictment named Lucas as a defendant; Lucas was named as an unindicted co-conspirator in the conspiracy count and, in Count Two; as the manager of a continuing criminal enterprise in violation of Title 21, United States Code, Section 848. Lucas was also charged in several substantive counts. S 75 Cr. 515 was superseded on October 29, 1975 by Indictment S 75 Cr. 919 which contained substantially the same charges against Lucas. Trial on Indictment S 75 Cr. 919 began on November 10, 1975 and on December 23, 1975, Lucas and the twelve other defendants on trial were acquitted on all counts.

6. Thus, purely by coincidence, two indictments against Lucas were randomly assigned to Judge Cooper and Judge Cooper heard the evidence in both cases.

II. The Motion Should Be Denied Because The Claim of Prejudice is Sham and Frivolous

7. The principal allegation of prejudice on the part of the judge is that "during the trial [United States of America v. Tutino, et al.] Judge Cooper, with all due respect, evidenced a bent of mind demonstrating he is personally biased against me." This conclusory charge is wholly without support either in fact or in the record of

either of the proceedings before Judge Cooper and is wholly insufficient, as a matter of law, to justify the relief sought.

> To be sufficient the affidavit must set forth facts, including the time, place, persons and circumstances, and, where based upon an extra-judicial statement of the judge, the substance of that statement. Berger v. United States, supra, 255 U.S. at 34, 41 S.Ct. 230; Wapnick v. United States, 311 F. Supp. 183, 184-185 (E.D.N.Y. 1969).
>
> * * *
>
> If mere rumor, gossip, or general conclusory opinions were sufficient, any party could reject a judge at will. Hodgson v. Liquor Salesmen's Union Local No. 2 of the State of New York, 444 F.2d 1344, 1348-49 (2d Cir. 1971).

8. In addition to this conclusory allegation, Lucas (A) charges that on one occasion the Court showed "disdain and resentment" for him, and (B) alleges that the evidence at the Tutino trial, and Lucas cites several examples, "could not help but create a personal bias and prejudice in the Court . . . . " Lucas affidavit Paragraph 9, though Lucas is unable to cite any example of this alleged prejudice. The first claim is baseless. The second, even if true, is not grounds to recuse a judge.

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A. LUCAS' CLAIM THAT THE COURT SHOWED "DISDAIN AND RESENTMENT" FOR HIM IS FRIVOLOUS

9. The defendant does not, as he could not, support his charge with any citation to any incident on or off the record indicating bias on the part of the judge. He makes one conclusory allegation as follows:

> 12. The court additionally showed its disdain and resentment for me by refusing to hear my application to represent myself and discharge my attorney, and by refusing even to hear me on the record on this matter.

The true facts concerning this incident indicate the frivolous nature of Lucas' claim.

10. The true facts show that the trial judge, far from exhibiting bias against Lucas, repeatedly exhibited unusual and commendable concern not only for Lucas' right to a fair trial* but also for the personal

* For example, at the Tutino trial, the Court ruled inadmissible the following evidence against Lucas, though plainly admissible under well accepted authorities in this circuit, on the grounds that its impact on the jury would be inflammatory: (1) any reference by the witness Charles Morris to conversations in which Morris learned that Lucas had put a murder contract on him (Tr. 38); (2) testimony from the witness Morris that (a) Lucas in his presence had put out a murder contract on co-conspirator George Ford because Lucas feared Ford would testify against him and that (b) Lucas had suggested the murder of co-conspirator G.T. Watson for delivering weak narcotics; (3) testimony by the witness Lee Logan that Lucas had offered him $7,000 to murder George Ford; (4) testimony from the witness Charles Schuster that Schuster had agreed to testify only after receiving a telephone call while incarcerated at Rikers Island from an unidentified woman who told him that Frank Lucas was coming up on a big trial and was murdering prospective witnesses and accordingly, Schuster should be on his guard (Tr. 304a).

needs of Lucas throughout both trials.

11. Lucas motion to represent himself and the Court's ruling thereon, which Lucas claims in paragraph 12 of his affidavit showed the Court's "disdain and resentment for me", reads in its entirety as follows:

> MR. HOFFMAN: Yes, secondly Mr. Lucas has stated to me he would like to address the Court in essence what he told me is if he can't have the counsel that he feels he needs, he doesn't want any counsel and he will represent himself.
>
> I heard your Honor direct me to continue in my representation, but in view of the fact that this statement came subsequent to that direction, I want to bring it to your Honor's attention and I would ask your Honor to let Mr. Lucas address you.
>
> THE COURT: No. The Court has already directed what is to be done and we run the court here according to what we think is the law, not what an individual defendant wishes. He does not run the Court. He may make his application through his designated attorney and the Court will rule each and every time. That is the way we do it in this courthouse, and I will not allow Mr. Lucas, although he has asked for it on other occasions, to address the Court in person. This is not the first time. You point out to him as his lawyer that that is a dangerous practice. I will not be a part of it.
>
> MR. HOFFMAN: If it please your Honor, in view of the fact that Mr. Lucas has in essence discharged me and asked that he be allowed to represent himself, is your Honor denying him that motion?
>
> THE COURT: Yes.

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MR. HOFFMAN: And directing me to continue?

THE COURT: Yes.

(Recess.) (Tr. 41-42)

12. There is no suggestion of even a hint of bias or prejudice on the part of the trial judge in making this ruling. Indeed, the Court showed remarkable restraint since the circumstances which preceded the motion make it clear that the motion was a tactical ploy made in the hopes of creating a ground for a claim for reversal on appeal and not made in good faith. These facts are recited here at some length to show the sense of fairness, even-handedness and restraint exercised by the Court in the face of questionable tactics employed by Lucas and his attorneys.

13. When the original indictment in the Tutino case was returned, Jeffrey Hoffman, Esq., counsel for Frank Lucas, represented a co-defendant by the name of Marion Knuckles. When the superseding indictment, S 75 Cr. 919, was returned naming Lucas, Hoffman approached the Court and asked if he might be relieved of representing Knuckles so that he could represent Lucas. Hoffman represented that this was Lucas' request. Hoffman requested that Arthur Mass, Esq. a partner in the law firm of Lenefsky, Gallina, Mass and Hoffman, of which Hoffman was also a member, could represent Knuckles. After numerous discussions in chambers between

Mass, Hoffman, the Assistant United States Attorney in charge of the Tutino prosecution and the Court, the Court disqualified Mass from representing a co-defendant in the same trial with Luc on the grounds: (1) that there could be a conflict of interest where the same law firm represented two defendants, and (2) on the grounds that the Government had represented that testimony may be elicited from one of the government witnesses, who had previously been represented by the Lenefsky, Gallina, Mass and Hoffman firm, that would implicate Mass in a scheme of corruption.

14. Substitute counsel was, thereafter, obtained for Knuckles. At no time during any of the lengthy discussions concerning the representation of Lucas and Knuckles, which lasted over a period of several weeks, did Hoffman suggest either that Lucas wanted additional counsel or that Lucas wished to represent himself.

15. It was not until November 11, 1975, the second day of the Tutino trial, that Hoffman asked to associate Gino Gallina, Esq., another member of his law firm, to assist him in the trial and act as co-counsel (Tr. 28). By virtue of other trial commitments, Gallina would be available only until the end of November or early December, well short of the projected end of the Tutino trial (Tr. 28-29).

The Government objected to Gallina's coming into the case at such a late date on the ground that there could conceivably be at trial evidence which would put Gallina in a bad light (Tr. 29(. The Government represented that one of its witnesses had told the Assistant United States Attorney about a conversation with Zack Robinson, a defendant in the Tutino indictment, in which Robinson informed the witness that he had been successful in beating various narcotics cases by having the Government witnesses murdered and by using his lawyer, Mr. Gallina and his investigators in order to obtain the information necessary to carry out these murders (Tr. 31).*

Moreover, Gallina had been named as an unindicted co-conspirator in the Magnano trial, and the evidence at that trial disclosed his involvement in a corrupt scheme to obtain narcotics moneys. The judge denied Hoffman's application to associate Gallina for purposes of a portion of the trial, stating,that if evidence with respect to Gallina came out it "would devastate the rights of the defendant involved, I don't care how much he wants the lawyer,

* In fact, Marjorie Morris, who had testified against Robinson in a Grand Jury in Pittsburg, Pennsylvania and whose testimony formed the basis of an indictment against Robinson in the United States District Court in Pittsburgh was murdered days after being interviewed by Gallina's investigators (Tr. 31). At least two other witnesses against Robinson had been murdered.

I have to protect his rights despite himself...." (Tr. 36). (Tr. 35-36). It was only after these proceedings that Hoffman made an application that Lucas wished to represent himself.

16. Far from evidencing prejudice against Lucas, Judge Cooper during both trials made numerous efforts to look after Lucas' personal needs. These included the following: the Court made arrangements with the Warden of the Metropolitan Correction Center ("MCC") so that Lucas could have conjugal visits with his wife, who was also incarcerated; the Judge communicated personally with the warden and the United States Marshal to assure that Lucas received medical attention Lucas claimed he needed while incarcerated; the Court made arrangements with the MCC and the United States Marshal so that Lucas and the other incarcerated defendants could sleep later in the morning; the Court made arrangements with the marshals so that Lucas could eat food brought to him by friends in the courtroom during the lunch hour rather than requiring Lucas to eat with the other prisoners; the Court directed its law clerk to file papers, which had not been prepared by Lucas' attorneys in a timely fashion, with the United States Marshal on Lucas' behalf to assure that witnesses Lucas' attorney alleged would testify in his behalf would be produced.

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B. PREJUDICE TO BE DISQUALIFYING MUST HAVE AN EXTRA-JUDICIAL ORIGIN: THE SO-CALLED "PREJUDICE" HERE ALLEGED IS NOT "PREJUDICE" AT ALL, BUT RATHER MATTER WHICH THE COURT IS FULLY ENTITLED TO TAKE INTO ACCOUNT AT THE TIME OF SENTENCE

17. The essence of Lucas' claim of prejudice is that the Court has inevitably developed prejudice against him by virtue of hearing the evidence at the Tutino trial. This claim is based on at least two misconceptions of law. First, the type of "prejudice" here alleged is not prejudice at all. Prejudice, to be disqualifying, must have a extra-judicial origin. The fact that the judge may have developed an impression of Lucas from the evidence that developed before him is not prejudice. Secondly, far from being "prejudicial," the evidence at the Tutino trial at which Lucas was acquitted is something that the Court is entitled to consider at the time of sentence.

18. Title 28, United States Code, Section 144, specifies that "personal bias or prejudice" must be shown, and the courts have stated that "personal" in this context "is in contrast with judicial; it characterizes an attitude of extra-judicial origin . . ." Wolfson, supra, at 124. As the Supreme Court has stated, "[t]he alleged bias and prejudice to be disqualifying must stem from an extra-

judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." United States v. Grinnell Corp., 384 U.S. 563, 583 (1966). Lucas has cited not one hint of any type of extra-judicial prejudice. Each claim of prejudice set forth by Lucas relates to evidence that was adduced during judicial proceedings before the Court.

19. Moreover, the evidence adduced at the Tutino trial, far from being prejudicial, is a matter the Court is entitled to consider at the time of sentencing. In United States v. Swaiq, 454 F.2d 181, 183-184 (2d Cir. 1972), the Court of Appeals stated:

> A sentencing judge has very broad discretion in imposing any sentence within the statutory limits, and in exercising that discretion he may and should consider matters that would not be admissible at a trial. Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct. 421, 3 L.Ed.2d 516 (1959) (hearsay); Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed 1337 (1949) (prior crimes for which defendant was not tried, and hearsay); United States v. Schipani, 435 F.2d 26 (2d Cir. 1970), cert. denied, 401 U.S. 983, 91 S.Ct. 1198, 28 L.Ed.2d 334 (1971) (evidence obtained in violation of fourth amendment); United States v. Doyle, 348 F.2d 715 (2d Cir.), cert denied, 382 U.S. 843, 86 S.Ct. 89, 15 L.Ed.2d 84 (1965) (charges dismissed without adjudication of merits). Appellant argues that his case is distinguishable because none of the other cases concerned with this issue involved the consideration of evidence on charges which the defendant was acquitted. However, just as the sentencing judge may rely upon information as to

crimes with which the defendant has been charged but not tried, see United States v. Davis, supra, so here the judge could properly refer to the evidence introduced with respect to crimes of which defendant was acquitted. Acquittal does not have the effect of conclusively establishing the untruth of all the evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal

(sic)

This holding was recently reiterated in United States v. Hendrix, 505 F.2d 1233, 1235 (2d Cir. 1974)

III. The Application Should Be Denied Not Only Because It Is Baseless But Also Because It Is Untimely

20. The motion, filed and served on January 21, 1976, was that the Judge should not sentence Lucas on January 22, 1976. The sentence is now scheduled for January 27, 1976. Since the affidavit was not filed ten days in advance of the sentencing, it is untimely. The statute, Title 18, United States Code, Section 144, plainly provides:

> The affidavit . . . shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time.

21. In this case, there has been no "good cause . . . . shown for failure to file it within such time and, indeed, there could not be, since all of the allegedly "prejudicial" material occurred before and was known to Lucas before December 23, 1975, the date of Lucas' acquittal in the Tutino case.

IV. Under the Circumstances of this Case, the Judge Has a Duty Not To Recuse Himself.

22. The motion that a judge recuse himself is not addressed to the discretion of the Court. Where, as here, the moving "affidavit is insufficient the Judge is under just as much of a duty to deny the application as he would be to recuse himself if it were sufficient." Hodgson v. Liquor Salesmen's Union Local No. 2 of the State of New York, 444 F.2d 1344, 1348 (2d Cir. 1971); Rosen v. Sugarmen, 357 F.2d 794, 799 (2d Cir. 1966); In re Union Leader Corp., 292 F.2d 381, 391 (1st Cir.), cert. denied, 368 U.S. 927 (1961).

23. As the foregoing makes clear, the affidavit is insufficient and the application must be denied. At bottom, Lucas' motion is an obvious attempt to avoid

sentencing by a judge who has heard the most damning type of evidence against him. The evidence at the two trials reveals beyond doubt that Lucas is a professional criminal and narcotics dealer of unprecedented proportions and that he is a man of almost unbridled personal viciousness. While Lucas' last minute attempt to avoid sentencing by someone who has seen this evidence unfold is, perhaps, understandable, the law is clear that the motion must be denied.

WHEREFORE, the application should be denied.

/s/ Dominic F. Amorosa
DOMINIC F. AMOROSA

Sworn to before me this
26th day of January, 1976.

/s/ Mary L. Avent
MARY L. AVENT
(Notary Stamp)

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Probation Form 2

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58553-RO(MX)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Presentence Report

Name: FRANK LUCAS, A/K/A/ Freddie Lucas

Address: 933 Sheffield Road
Teaneck, N. J.

Age 45 Date of Birth 9/9/30

Sex Male Race Negro

Citizenship U. S. (Native)

Education 4th Grade

Marital Status Common-law

Dependents Three

Soc Sec No. 241-40-6490

FBI No. 285 622 C

Date of Sentence:

Docket No. 75 Cr 687

Offense: See Offense Sheet

Penalty $50,000 fine and/or 30 yrs. on each Count, plus at least 6 yrs special parole term if committed

Verdict: Guilty on 10/24/75 to Cts. 1, 5, 6, 7 before Judge Irving Ben Cooper

Custody At M.C.C. on Writ from N.J.S.P.

Asst. U. S. Atty
Mr. Dominic Amorosa

Defense Counsel
Mr. Jeffrey Hoffman
Tele: 944-1550
(Privately retained)

Detainers or Charges Pending: Currently serving 2 - 3 years N. J. State Prison

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Co-Defendants (Disposition) See Offense Sheet

DEFENDANT's VERSION OF OFFENSE

The defendant did not wish to discuss his involvement in the instant offense since he plans to appeal the conviction. Lucas indicated that on the advice of his attorney, he did not wish to give any statement regarding this offense or any related cases.

PRIOR CRIMINAL RECORD FBI # 285 622 C

DATE	CHARGE	PLACE	DISPOSITION
9/15/53	Assault	Manhattan	Dismissed 9/16/53
6/8/56	Robbery	Manhattan	1/17/57 - 5 yrs Elmira Reformatory. Paroled 9/22/58. Max. Exp. 6/6/61

The defendant and an accomplice assaulted and robbed a man at gunpoint of $300 at a dice game. Lucas was paroled on 9/22/58 and his maximum expiration under parole supervision was 6/6/61.

11/17/60	Violation of Federal Narcotic Laws	SD/NY	On 1/17/61 - 5 yrs before Judge Archie O. Dawson

Lucas and an accomplice sold approximately one half ounce of heroin to an undercover narcotics agent for $175 on 1/14/60. He was released as an MR on 3/13/64 and his maximum

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expiration date was 5/20/65. During the time that Lucas was under supervision, he reported regularly, submitted monthly written reports sporadically, maintained a stable work record and his overall adjustment was considered good.

2/22/67	Policy	Manhattan	Dismissed 4/27/67
5/6/67	Policy	Manhattan	Dismissed
11/5/68	Rape and Sodomy	Bronx	Dismissed
4/21/70	Forgery	Manhattan	$50 fine and/or 10 days
3/14/72	Poss. of Firearm	Teaneck, N.J.	1/19/73: 1-2 yrs suspended sentence, $500 fine, 3 yrs probation

An investigation conducted by Bergen County Narcotics authorities in search of the defendant's home resulted in the seizure of a .38 caliber revolver found in Lucas' residence at 933 Sheffield Road, Teaneck, N. J. On 1/19/73 he was placed on three (3) years probation and fined $500.

10/10/74	Violation of Probation	Bergen "City", N. J.	4/16/75: Sentenced 2 - 3 yrs. N. J. State Prison

The defendant was convicted of violation of probation in that he failed to report to the Probation Office, left the U. S. without permission and continued efforts to reach him were unsuccessful.

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Lucas is currently serving this sentence at New Jersey State Prison at Trenton and he is due for a Parole Board review on 2/2/76. His maximum expiration date is 2/20/78.

4/18/75	Violation of Federal Narcotic Laws	SD/NY	Instant Offense
10/30/75	Violation of Federal Narcotic Laws	SD/NY	Acquitted on 12/23/75

The defendant and sixteen codefendants were charged in an 18 Count Indictment (75 Cr 1038) for Violation of Federal Narcotic Laws. (Title 21, U. S. Code, Sections 848, 173, 174, 812, 841(a)(1) and 841(b)(1)(A)).

PERSONAL AND FAMILY HISTORY

The defendant was born on 9/9/30 in Wilson, N. C. He is the second of ten children from the union of Fred and Mahalee (Jones) Lucas. His father and mother are ages 67 and 66 respectively, who were tenant farmers in Wilson, N. C., are now retired, living in Englewood, N. J. since 1965.

Other members of the defendant's family are: Dorrie Mae Carnegie, age 47, Newark, N. J.; Paul, age 42, a Newark, N. J. truck driver; Lawrence, age 39, Queens; Mattie Lassiter, age 40, Newark, N. J.; Emma Moore, age 37, Newark, N. J.; Laverne, age 28, Newark, N. J.; William and Monty, twins age 27, and Richard, age 25, all reside in Newark.

Due to the low income of his parents and the large family, Lucas was reared under impoverished economic circumstances and attended a rural school in Lenoir County, N. C., completing only a 4th grade education at the age of 13. He began helping with the farm chores on a full time basis and later worked for several years as a houseboy for one Clinton Sutton, earning $15 per week until the age of 18. He was later employed in a tobacco factory in Kinston, N. C. until 1950, when he came to New York City to seek employment. A few years later, many of his brothers and sisters came to the New York City area, most of whom reside in Newark, N. J. Thereafter, in 1965, his parents moved to Englewood, N. J. where they own a one family home.

MARITAL HISTORY

The defendant married Flora Little in Wilson,N. C. during June 1949. Twin daughters, Ruth and Ruby, were born from this relationship on 10/24/49. Lucas attempted to move his family to New York City in 1950 but his wife refused to move and remained in North Carolina. Limited employment opportunities and the overcrowded residence situation led Lucas to the decision of separating from his wife. He occasionally sent support contributions for his children and the couple were finally divorced in 1964. His twin daughters, now age 25, are both married and reside in North Carolina.

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While living in New York City, Lucas married Marion nee Moore, now age 51, sometime in late 1964. The couple lived together until 1968 and no children were born from this relationship. The couple were divorced in 1969.

Lucas had an out of wedlock relationship with Jenita Hunt which resulted in the birth of one child, Frank, Jr., now age 15. For the past five years this child has been living with the defendant and Lucas indicates that he has had little contact with Miss Hunt since that time.

Since 1969 Lucas has been living with Julie Farrait, now age 29. Miss Farrait is a native of Puerto Rico who came to the U. S. in 1969 with her parents. She completed one year of Liberal Arts studies at the University of Puerto Rico in 1968. The couple have a daughter from this union, Francine, age 3. Although both the defendant and Miss Farrait indicate that they were married in Puerto Rico on 5/8/70, we were unable to locate the marriage certificate through the Commonwealth of Puerto Rico. Miss Farrait later admitted that there was no marriage license and that she and Lucas were sharing a common-law relationship.

Miss Farrait was arrested along with her husband on 1/28/75 in their Teaneck home for removal of property subject to seizure in that she attempted to throw three cash filled suitcases out a bathroom window containing $585,000. She

was sentenced on 1/10/75 to six (6) months before U. S. District Court Judge Herbert J. Stern in the District of New Jersey.

Lucas indicated that he and his common-law wife have maintained a stable and harmonious relationship over the past six years, noting that her recent sentence, along with his present incarceration, poses a difficult situation for the two children. Miss Farrait, who uses the name Mrs. Lucas, indicated that her daughter is currently residing with her parents at 526 Astoria St., San Juan, P. R. and the son is with Mr. and Mrs. Joe Louis, the ex-heavy weight fighter, in Las Vegas. Mrs. Lucas went on to say that her recent incarceration has had a profound effect on her daughter who has recently developed emotional problems. She impressed us as a quiet, petite young woman who has had difficulty coping with her recent incarceration. She is overly concerned over the welfare of her children and her husband's health.

Lucas' family has been residing at 933 Sheffield Road, Teaneck, N. J. from 1971 until February 1975. This is a nine room, one family ranch home that is approximately fifteen years old, located in a mixed residential neighborhood. The house is presently vacant and Lucas intends to rent or sell the home shortly.

Before her incarceration, the defendant's wife was

living at 500 E. 77th St., New York City, an apartment she sublet from Maria Turman. She also lived,with the two children, at 160 Central Park South in an apartment owned by Mr. and Mrs. Joe Louis.

HEALTH

The defendant is 6'2" tall, weighs 192 pounds, has black hair and brown eyes. Lucas has had a series of operations on his left hand for removal of a tumor and an osteomyelitis condition. He indicates that he has been under the care of Dr. Ralph Marcov, at the Hospital for Special Surgery in New York City. His hand has not responded to surgery and is severely deformed and he may be in need of another operation.

During the interviews, the defendant related in a guarded but cooperative manner. He readily discussed his personal and family background but did not wish to refer to his narcotics activities. Lucas impressed us as a manipulative, friendly individual in the dull normal intelligence range (IQ estimated 82) but he is viewed as being shrewd and cunning. In discussing his background history, he appeared to be a sincere, direct, unsophisticated individual.

EMPLOYMENT

Lucas claims that he has been self employed for the last several years. In 1972 he purchased a ranch, Paradise Valley

Inc., Oxford, N. C. which consists of over 1,000 acres of land where tobacco, soybeans and corn are grown. He also raises cattle on this land. This company is owned by the defendant and his wife. Lucas also is president of the Royal Cattle Acre Inc., a New York City corporation located at 30 Broad Street. He is president of this corporation which holds approximately 800 acres of tobacco land in Oxford, N.C. This corporation was also formed in 1972 and both Royal Cattle Acre Inc. and Paradise Valley Inc. are estimated to be valued at about $900,000. Lucas indicates that the yearly corporate profits from these holdings are about $300,000.

From 1970 to 1972 Lucas owned a service station at 151st St. and St. Nicholas Ave. in New York City. Between 1971 and 1973 he owned the Ned King Cleaning Co. located at 81st St. and Broadway in Manhattan.

From 1953 to 1968 Lucas was a member of the Demolition and Wreckers Union, Local 95, 66 Adams St., New York, N. Y. He worked for various firms during that time but for the most part was employed by the Drachman Demolition Co. 52-25 Second St., Long Island City. After his release from the Federal Penitentiary in 1964, the defendant resumed working for the Drachman Demolition Co. until 1968.

FINANCIAL CONDITION

The defendant did not submit a financial statement and

did not specifically discuss his net worth. However, he is president and controller of the two corporations, Paradise Valley Inc. and Royal Cattle Acre Inc., worth a total value of approximately $900,000 consisting of approximately 1,800 acres of farm land.

The defendant also owns a one family home in Teaneck, N. J., which he plans to sell.

Respectfully submitted,

JOHN T. CONNOLLY, Chief U.S.P.O.

(signed)

ROBERT OHANNESIAN

U. S. Probation Officer

RO:vb
1/9/76
Reviewed by: Peter S. Cosmides,

Supervising U. S. Probation Officer

Judge's Chambers

UNITED STATES DISTRICT COURT

Southern District of New York

New York, New York 10007

Irving Ben Cooper

Senior Judge

January 28, 1976

Re: U.S.A. v. LUCAS

Gentlemen:

During the course of yesterday's sentencing proceedings, Assistant United States Attorney Amorosa made mention of our remarks when we imposed sentence in the cases of Lucas' co-defendants on December 3, 1975. We have this day obtained, through the good offices of the official court reporter, a copy of the minutes recorded on December 3 and have examined same.

We order that the official court reporter add to yesterday's proceedings a copy of this letter and pages 48, line 19, to 56, line 10, of the minutes taken on December 3, 1975.

The government will please promptly furnish the attorney for Lucas a copy of pages 48 to 56 aforementioned.

ewP

Very truly yours,

(signed)

Irving Ben Cooper

United States District Judge

Dominic F. Amorosa, Esq.,

Assistant United States Attorney

Jeffrey C. Hoffman, Esq.,

30 Broad Street

New York, New York 10004

Official Court Reporter

THE COURT: I must again express my sense of appreciation to the attorneys who feelingly, and not as mute pieces, have spoken with their hearts as well as their minds. More than that no client can ask. We are confronted with the stark reality that a jury after listening to this trial, the trial in this case that took five weeks almost to the day, with an unfolding of testimony, chapter and verse, with a full opportunity to counsel to hammer away as they did without restriction and without restraint so that the jury would have before it the utter delineation of the factual material on which to base a verdict.

We have spent over three and a half hours on the charge trying to break it down ito its simplest syllables. Everyone concerned with the due and proper administration of justice in the case was surcharged to hilt with a sense of overwhelming responsibility. Not only to the defendant, but to the litigant constantly neglected and forgotten in most trials, and that is the Government.

So the Court sees no reason and has no reason to interfere with the verdict of the jury. They pronounced it, and they went about it in apparently meticulous fashion. This was not the result of a

ewP

haphazard or spontaneous reaction. There was ample opportunity for sober reflection as the record will show.

Their notes to the court were sound and solid. And throughout the trial we had occasion to express gratitude for the unbending and almost unrelenting demand that each juror imposed upon himself and herself to listen with care to each and every word. We felt that was a method that could add impetus to continue in that fashion.

And so not only on the merits, but because we wanted them to continue to hang on to each word, we encouraged them from time to time to keep it up, to use the vernacular.

They pronounced the verdict. And under the law the judge has no alternative but to proceed to sentence based upon that verdict.

These defendants were found guilty of conspiracy to distribute heroin and with the actual distribution and possession with intent to distribute vast amounts of heroin, both pure and diluted. The proof established that from in or about late February, 1973, to approximately the end of February, 1974, Perna, Malizia and Verzino were engaged in criminal partnership to obtain massive quantities of pure and diluted heroin

and to resell this heroin to other members of the conspiracy. The defendants Magnano, Pallatta, Bolella, DeLutro and Soldano were the sources of the heroin supplied to Perna, Malizia and Verzino.

Lucas, whose sentence has been adjourned because he now stands trial in another case before this judge, Lucas ans Gwynn were among a group of individuals to whom this heroin was distributed. Such was the revelation of the testimony.

The convicted defendants were part of a tremendous network in this metropolitan area. Indeed, so far as our personal observations are concerned, this case is one of the largest domestic heroin cases in the history of narcotic law enforcement.

Although the identities of the foreign importers and the initial domestic recipients of the heroin in this case remain concealed, the convicted defendants represent a chain of distribution.

The prosecution of Magnana, Pallatta, DeLutro, Soldano and Lucas was the culmination of literally thousands of hours of intensive investigation by representatives of the United States Drug Enforcement Administration over a very, very, very substantial period of time.

Magnano, Pallatta and Bolella have been engaged in distributing heroin, says the evidence, from the beginning of the previous decade.

The trial proof established that Magnano, Pallatta and Bolella were receiving during the course of the conspiracy highly confidential information relating to federal narcotic law enforcement acticities which was channeled to them from or through a law enforcement official. To date the identity of this corrupted official remains unknown.

We have presided over trials involving the sale of substantial quantities of narcotics. Never, however, on a scale as extraordinary as this with its enormous quantities of heroin bought and sold on an almost daily basis. The acticities of this group emphasize the overlords and regimental tiers of operation, all governed by tight maneuvers and bold enough to successfully avoid governmental detection of which they were constantly apprehensive and aware. Nor have the important operational details of their cruel enterprise come to light even at this late date.

Let's face it. So inhuman, ruthless and cold blooded was their approach to the execution of their nefarious schemes that we sat aghast at the unfolding of

the enormity of their horrifying indifference to life's values.

The holocaust of misery, the dreadful terminus of life for legions following the vast narcotic operations revealed herein [are] too horrifying even to contemplate.

We have read with great care the favorable letters that documents presented. And we have read that reread the careful reports of the Probation officers. No heavier burden, with its accompanying strain, comes to the trial judge than the imposition of sentence. It is always a fretful experience.

We have exerted ourselves to the utmost to mete out sentences here which consider ever[y] scrap of available information relating to each defendant as a human being as well as the crimes of which he stands convicted

We endeavor to have these sentences reflect what is fair to the defendants and each defendant and what is fair to the community alike.

There has been reference repeatedly to children and to family and the enormity of the burden that incarceration imposes on the family. I have lived with that for 36 years. I have seen it inside out. It

sucks one's life blood almost to contemplate what happens to families. But that is the choice of each human being: to be a dishwasher and come home with a few dollars in cash and have the love and attention and devotion and respect of a home, no matter how humble, and to earn the respect of men of good will by a behavior pattern that can't help but stimulate high regard and esteem. That is the choice of all of us.

This judge, along with enormous numbers known to me -- we all had the chance to either get out of the economic dump, to live in alleys, to freeze, to go hungry. Sure, the tempotation was there to get away with something, to help keep things warmer at home, but the folks, illiterate, never saw the inside of a classroom, taught that is unclean, you don't do it, you starve first.

Others chose not to do that. They want the fast buck and the family is perfectly content when pop comes and digs his hand in his pocket and says, "Take care of it," handing over a large sum of money.

So the wife is happy, the bills are paid, the kids are well taken care of. Why grumble?

Ask yourselves whether you didn't know or should have known what was going on year in and year out.

was your man?

That works both ways. What am I to say as a judge, knowing as I do, because it is an everyday spectacle, that untold numbers because of their weakness succumb daily to drug addiction, become slaves to 't, commit heinous crimes as a result of it, kill people, wound others, commit unspeakable assaults, endless horrors on innocent people.

What do I say to those? And what do I say to the overlords who have made that possible?

This isn't the result of reading a report or a survey. This is what a judge sees with his own eyes and hears with his own ears. It is like a typhoid Mary, reinfecting and infecting others.

What do I say to the decent human beings in the community who are eking out a livelihood and who have to deny family this, that and the other, which family would like to have because there isn't enough money to take care of it? What do I say to them when they want to know what are we doing about those who are corrupting the neighborhoods with drugs and other horrifying events that ensue from this plague? Haven't they a right to a voice, too? Shouldn't they be heard to declaim this and to say that it is a pollution that

makes that atmospheric pollution almost a joy by comparison?

And, of course, counsel is right when they remind the judge that he must mete out sentence based exclusively on each human being. I have seen remarkable strength shown by almost unspeakable characters and I have seen the wind-up in the gutter of those who looked like spellbinders for the future good of themselves and the community.

And so we do address ourselves to the strength and weakness of each defendant. And the sentence is addressed not only to the crimes of which they stand convicted, but to their behavior pattern as human beings over a substantial period of time.

What do you think the judge does with all that material? Pushi t aside? We look at it, we reexamine it, we reread the reports, we pace up and down the floor. No matter how long you have been a judge, no matter how long you have been a surgeon you still can't say, "I have been operating for 50 years so I can cut, afford to be careless."

When he starts to talk that way, that is when his usefulness is ended.

And so we have to weigh everything from the

inside organs to the fingernails.

(Tr. 48 - 56)

DVA:art

A 613

November 11, 1975

Honorable Irving Ben Cooper
United States District Court Judge
Southern District of New York
Foley Square
New York, New York 10007

Re: United States v. Joseph Magnano, et al.
S 75 Cr. 687 (IBC)

Dear Judge Cooper:

Several days ago I learned that Mario Farna gave three written statements in October 1974 to representatives of the Federal Bureau of Investigation in connection with his escape from the Federal Detention Center in New York City in September 1974. I have enclosed copies of those materials and have also provided copies to all counsel by copy of this letter.

Sincerely,

THOMAS J. CAHILL
United States Attorney

By: _____
DOMINIC V. AMOROSA
Assistant United States Attorney
Tel. No. (212) 791-1960

Enclosures

EXHIBIT ONE

EXHIBIT TWO

A 614 INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

Place N.Y. N.Y.
Date Oct 13, 1974
Time 3:05 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. [illegible], SA, FBI, NYNY 10/13/74

Witness: Thomas F. Gilhooley, SA, FBI, NY, NY 10/13/74

Time. 3:12 pm

STATEMENT

"I, Mario Anthony Perna, have been made aware of the identity of the FBI Agents whose names appear as witnesses on this page and of the nature of questions they desire to ask me which relates to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

M.P. M.P.

EXHIBIT FOUR

M.P. "I make the following statement freely and voluntarily, and this statement is to be an addition and further clarification of a statement I made to SA Edward Holiday on the evening of October 11, 1974. M.P.

"Concerning Correction Officer Giannino, who aided me and the other six escapees, I want to say that an inmate at the Federal House of Detention by the name of John De Benidictus, also had had conversations with Giannino during the four months prior to the escape and was actually the person who informed Nelson Garcia that he thought Giannino could be approached seriously concerning an escape attempt. De Benidictus had been on friendly terms with Giannino, and Giannino had been bringing food into the jail at De Benidictus' request. De Benidictus then arranged a meeting between Giannino and Nelson Garcia, at which time a friendly and not serious conversation took place, at which time Garcia jokingly asked Giannino what it would take to get Giannino to open the doors, to which Giannino replied '$200,000'.

"A short time following that conversation, Giannino was transferred to the Control Room, and De Benidictus then arranged a subsequent meeting between Garcia and Giannino, which took place in De Benidictus' presence, and it was at this meeting that the terms regarding money to be paid to Giannino, and which appear in my earlier statement, were discussed and finalized.

"Subsequent meetings between Giannino and Garcia all were held in De Benidictus' presence, and those meetings, as my earlier statement reads, also related to obtaining impressions of the second and third doors, which we would have to go through to escape. De Benidictus obviously had full knowledge of all negotiations between Garcia and Giannino and was aware that I had completed construction of the second door key made from an impression supplied by Giannino. De Benidictus was not aware that I had successfully constructed a key which opened the first door which was made, as I earlier stated, prior to the first negotiation with Giannino regarding impressions.

"Approximately four to five days before the escape, De Benidictus was made aware of the existence of the first door key but was never told about the third door key because I did not trust him and felt that he might be setting us up. De Benidictus told M.P. M.P.

M.P.
Garcia that he wanted to escape with us, and he also M.P.
discussed that fact with me, but I put him off because
I did not trust him. A few days prior to the escape
we let De Benidictus know that we had tentative plans
to escape on September 23 or September 24, and I also
told him that I would probably have the third key made
by them. Actually, I already had it made.
CMP

"On the day of the escape, I did not tell
De Benidictus of our escape plans nor did any of the
other escapees because, as I said before, we did not
trust him.

"The reason I did not mention De Benidictus'
name before now was due to the fact that I assumed he
had already given the FBI information about his knowledge
of the escape and the escape plans involving Giannino."

I have read the above statement consisting
of this page and two others and declare
that they are true and factual to the
best of my knowledge.

Mario Rivera

Edward J. Holiday, SA, FBI, NYNY 10/13/74
Rene T. Walker, SA, FBI, Myf. Fla 10/13/74

M. P.

-3-

ERROGATION; ADVICE OF RIGHTS

EXh

A 617

YOUR RIGHTS

Place N.Y. N.Y.
Date 10/22/74
Time 8:15 AM

ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Mario Perna

Witness: Edward J. Holiday SA, FBI, NYNY 10/22/74

Witness: Robert F. Kaminsky, SA, FBI, NY, NY 10/22/74

Time: 8:16 AM

STATEMENT

MP

MP "I, Mario Anthony Perna, have been made aware of the identity of Special Agents Edward J. Holiday and Robert F. Kaminsky, whose names appear as witnesses on this page, and of the nature of questions they desire to ask me which relate to my escape from the Federal House of Detention in New York City on September 22, 1974, and prior events connected to that escape.

MP

MP

"I make the following statement freely and voluntarily and wish to make clear at this time that this statement is being made by me to further clarify and add to statements made by me on October 11, 1974, and October 13, 1974. Further, I am making this statement at this time to disclose the involvement of members of my family, friends, associates, and a member of the clergy, which I previously had desired to protect.

"My earlier statement concerning obtaining and using a brass plate taken from a stair at the Federal House of Detention was fictitious. Furthermore, I did not make the second and third door keys from impressions supplied by Correction Officer Giannino. As I indicated earlier in this statement I fabricated information concerning the brass plate and the fact that I made the second and third door keys in an effort to misdirect the investigation so as to avoid implication of the people I referred to above.

"In June or July of 1974, while an inmate at the Federal House of Detention in New York City, I did make the first key to the first of three doors necessary to negotiate for a successful escape; however, the key I made did not work and I discarded it. That first attempt was made by using a scrap piece of brass supplied to me by inmate Fiocconi, who later escaped with me. I then made another attempt at the first door key by using a file to gouge channels into a piece of metal. No guard aided me in my attempt to duplicate the first door key and I merely closely observed that key on the keyring hanging from the guard's belt, over a long period of time. After starting construction of this key, inmates Luppes and Fiocconi asked me to attempt to line somebody up, namely a locksmith, to assist us. At about this time I was visited by my brother, Pasquale Perna, whose nickname is Patty, age 50 or 51, who resides at 5 First Street, Harrison, New York, and during my visit with my brother we discussed having a key made. My brother said he thought he knew someone who might be able to make a key. A short time later I was visited by my girlfriend, Yvonne Cruz, and during that visit, which was a contact visit, I gave her a drawing which included dimensions of the first door key, which I obtained only through visual observation of that key, and by using tongue depressors, cheese and bread dough to obtain dimensions. Yvonne gave the drawing to my brother, Pasquale, and he in turn contacted a locksmith, who I do not know but who is known to my brother and to Yvonne. I do know that the locksmith is an elderly man, retired, who resides in Harrison, New York or New Rochelle, New York.

"My brother contacted the locksmith and for a fee of $50 the locksmith made a key from the drawing I had given to Yvonne. The locksmith took approximately one day to make the key. My brother then gave the finished key to my wife, Crucita, and she put it in a large greeting card approximately eight inches by eleven inches in size, which was then placed in an envelope and joined by approximately one dozen additional similar greeting cards in envelopes, which were all then placed in a large manila envelope. My wife then brought that package containing the key to the office of a Catholic priest, known to me as "Father John," whose office is in lower Manhattan. Father John is a regular visitor to the Federal House of Detention and is between 50 and 60 years old, approximately 5'5", medium build, grayish black hair, balding. He wears glasses. My wife, upon delivering the package to Father John, asked him to deliver it to me in jail and he did so, leaving the package on my bunk. It is entirely possible that Father John did not have any knowledge of the key.

"At the earliest opportunity I tried the key in the first door and it did not work. I then realized that the dimensions that I had given to Yvonne had been wrong. I had mistakenly thought that the dimensions of the teeth of the key were one-eighth of an inch whereas they were actually one-sixteenth of an inch.

"Through trial and error and the use of an additional scrap of brass supplied to me by Fiocconi I then made a key to the first door that worked.

"Attempts by me to duplicate the second and third door keys were unsuccessful, as I had mentioned in my earlier statements.

"After Correction Officer Giannino was successfully approached by inmate DeBenidictus and inmate Nelson Garcia, he supplied an impression in styrofoam of the second door key approximately six weeks prior to the escape. I received the impression, wrapped the impression in blank white paper and placed it in an unfranked envelope, white in color, approximately ten inches long and four inches wide. I then gave that envelope, which I had sealed and which was not addressed, to Father John with instructions for him to give it to my wife who was then in Mt. Sinai Hospital located on Fifth Avenue in Manhattan. This occurred in early August, 1974, to the best of my recollection. Father John gave the unaddressed envelope to my wife in the hospital and my brother Pasquale went to the hospital and picked

it up. He then contacted the locksmith, who charged $100 to make a key from that impression. In approximately one day the key was completed and given back to Pasquale, who in turn gave it to my wife, who then followed the same procedure as I earlier described by placing the key in a large greeting card, which was placed in a larger envelope along with other greeting cards. My wife instructed my brother to bring the cards to Father John's office, which he did, but upon handing that package to Father John, Father John refused to accept it because he felt a hard object that felt like metal. My brother offered Father John money to take the package to me and FatherJohn refused. My brother then took the package back to my wife in the hospital at which time my brother and my wife had an argument concerning me and following that argument my brother either took the package with the key inside, or just the key itself, and gave it to Yvonne.

"As soon as I found out about Father John's refusal and informed Fiacconi and Luppes, we decided we must find another way to get the key inside. Luppes and Fiacconi suggested that the key be given to Giannino to bring in but I refused.

"The day following Father John's refusal, FatherJohn came to the prison and confronted me on the third floor and told me he was very upset that my brother had attempted to give him a package which contained a hard object the night before. Father John told me also that my brother offered him money and then Father John told me to not ask again for him to bring in anything from anybody and also told me that if I wanted anything, he would buy it and bring it in himself. Father John told me that he did not know what was in the package brought to him by my brother and told me that he did not know what my brother was trying to do. He also said that he has prayed that he has not done anything wrong in the past, at which time he referred to the first package containing cards which also contained the key to the first door.

"Following this occurrence, Giannino supplied another impression of the key for the second door with a tracing and dimensions and at the same time supplied impressions for the key to the third door. Prior to this time, $1,500 had been delivered and placed in Giannino's car trunk as I indicated in earlier statements. The $1,500 was delivered by a man known to me as Ponzo, who is a white male, of Italian descent, approximately 5'4", approximately 35 years of age, black hair, stocky build, and who resides in the vicinity of 116th Street and First Avenue in New York City. He works at the Delightful Restaurant, which is located at the corner of 116th Street and First Avenue in New York City. The restaurant is owned by members of Ponzo's family. Ponzo delivered that money following instructions given to him by Harry Luppes, whose true name is Ernest Malizia one of the men who escaped with me. Ponzo is

Malizia's brother-in-law. Ponzo was supplied with the trunk key of Giannino's car by means unknown to me. Malizia took these impressions, wrapped them in blank white paper and placed them in an unfranked white envelope, the dimensions of which were approximately ten inches long by four inches wide. Malizia gave the envelope to Father John with instructions to hold it at his office for his son Richard Malizia, also known as Ricky, to pick up. Richard Malizia lives in Nanuet, New York with his mother, and is approximately 21 years of age, 5'7" or 5'8", slim build, black hair.

"As I mentioned, Ricky was supposed to pick up the envelope containing the impressions at Father John's office but for some reason unknown to me he was unable to do so. My brother Pasquale was unable to pick it up because of his prior contact with Father John and because Father John had refused the package with the key in it. Yvonne then was instructed by me to go to Father John's office and pick up the envelope containing the impressions, which she did.

"Yvonne then contacted my brother who told her to bring the impressions to the locksmith and gave her instructions how to get to the locksmith's location. She followed his instructions and the key to the third door was made for a price unknown to me. My brother picked the key up from the locksmith and give it to Yvonne. I want to point out that because Giannino had supplied a second impression of the second door key the locksmith made another key for the second door and, therefore, my brother picked up both keys, that is, to the second door and the third door. I also want to point that to the best of my knowledge my brother or Yvonne was holding the second door key made by the locksmith and which was in the package refused by Father John.

"Yvonne gave the two keys plus at least two brass blanks also suppled by the locksmith to Ponzo or Ricky. Prior to giving them to either Ponzo or Ricky, Yvonne wrapped all of the keys together, which now included the key to the second door and which was wrapped in the package that Father John refused, another key to the second door, and a key to the third door, at least two brass blanks and a round and a flat file. Yvonne wrapped all of these items in white adhesive or masking tape and Ponzo put the package in the trunk of Giannino's car.

A 622

MP "I wish to point out at this time that Ricky was supposed to put either the money or the white package containing the keys and files in the trunk of Giannino's car but on the night he was supposed to do that Giannino's car was parked on the corner of 11th Street and West Street, which was in view of the television cameras and, therefore, no attempt was made that night by Ricky. Ponzo, therefore, accomplished both tasks on different dates. MP

MP "After viewing three keys which Agent Holiday told me were recovered at the Federal House of Detention during the week of October 14, 1974, I can say with certainty that the longest of the three keys which also has a hole in one end was made by the locksmith and was designed for the second door. That key did not work because the channels were off center and I forced the key into the lock which caused the key to split and, therefore, became useless. Another of the three keys, the one with teeth on both ends, also was made by the locksmith, that is, one end was made by the locksmith and that was designed for the first door, as I mentioned earlier the teeth were one-eighth inches apart and should have been one-sixteenth inches apart. The other end of that key was an attempt by me and Fiocconi to make a key for the second door. The smallest of the three keys showed to me by Agent Holiday was an attempt made by Fiocconi at the third door key, to the best of my recollection, and the metal used was received in the form of a plank supplied by the locksmith.

MP MP

I have read the above statement consisting of this page and five others and declare that they are true and factual to the best of my knowledge

Mario Ponzo

Edward J. Holiday, SA, FBI, NY NY 10/22/74
Robert F. Kamuth, SA, FBI, NY, NY 10/22/74.

[illegible] (6) [illegible] Sept. 23 [illegible]

INTERROGATION; ADVICE OF RIGHTS

YOUR RIGHTS

A 623

#2.5

Place N.Y. N.Y.
Date Oct. 11, 1974
Time 8:05 pm

Before we ask you any questions, you must understand your rights.

You have the right to remain silent.

Anything you say can be used against you in court.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer.

WAIVER OF RIGHTS

I have read this statement of my rights and I understand what my rights are. I am willing to make a statement and answer questions. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion of any kind has been used against me.

Signed Marie Branca

Witness: Edward G. Holden SA, FBI, NY NY 10/11/74

Witness: Edward J. Baker Special Agent FBI - 10/11/74

Time: 8:09 pm

The above Special Agent was properly identified to me and I agreed to talk about my career from [illegible] in Sept. 1973

STATEMENT

I, Marie Anthony Branca, make the following statement freely and voluntarily. I am 45 years of age, my date of birth is May 6, 1929, and I was born in New York City. I escaped from the Federal House of Detention in New York City on Sept. 22, 1974 after having served six months of an approximately

EXHIBIT TWO

BEST COPY AVAILABLE

A 624

M.T.

12:40 or 12:45 pm.

The facts surrounding the escape are as follows: About 4 1/2 months prior to Sept. 22 I removed a strip of brass about 30-36 inches long and 3 inches wide from the top step of the stairs leading from the second to the third floor, also described as the inner staircase. I cannot specifically recall if the brass strip came from that staircase step but if you check at the jail you will find a brass strip missing from the top step of one of the staircases. The reason I cannot specifically recall the staircase is due to the fact that I tried to remove more than one before being successful. It was necessary to remove more than two screws to free the brass strip.

I then obtained a file from the boiler room and also cut the brass strip into pieces about 4 1/2 inches in length by 7/8 inches and hid them in several different places. Most of the time I carried a few of the pieces on my person.

By using dampened bread dough which I pressed against the first door I was able to get an impression of the lock opening and

thus the measurements of the lock were obtained. I then began to fashion a homemade key by filing down one of the cut brass strips and cutting the channels into the brass, that is, the side channels. The only tool I used was the file mentioned above. I then found it necessary to closely observe the actual institution cell key as it hung from the key ring while on the belt of various correction officers in order to determine how I was going to duplicate or imitate the teeth of the cell key. I filed a little at a time and two to four times a day I tried the key in the lock of the sallyport door which is the first door I would have to open for the escape. Following a period of trial and error lasting 5-6 weeks I had finished the key and it opened the sallyport or first door. The color of my homemade key was close to the color of the institution key and the dimensions of the finished product were about 4 to 4 1/2 inches long, 7/8 of an inch thick. It contained 4 teeth and the teeth were 1/16 of an inch apart. I will make a drawing or sketch of the key I made.

I attempted to repeat my effort for the second or inner sallyport door and made

similar impressions of the outer portion of the lock, not the tumblers, using tongue depressors and a piece of cheese. I was successful in getting partial impressions of the tumblers and was therefore successful in creating a partial key containing the side grooves and some teeth but my efforts were hampered by the fact that I was not able to get a glimpse of a close look at the the second or inner sallyport key due to the fact that those keys do not normally enter the institution. The second key and the warehouse key usually remain outside the institution in the hands of correction officers working in the trash and warehouse areas.

I was therefore unable to make the second key since I could not accurately copy the teeth but I was determined to keep trying.

About 7-8 weeks prior to Sept. 22, 1974, a Correction Officer by the name Giannino, who was working on the third floor, was approached by Nelson Garcia, one of the escapees, and while making general conversation he joked with Giannino about "how much money would it take to open the doors" and Giannino replied that it would take $200,000. Giannino had been on

friendly speaking terms with Garcia and had been bringing in cold cuts to Garcia. Garcia then approached me and stated that he had the above conversation with Giannino and was wondering whether he should approach Giannino in a serious way concerning Giannino's assistance in effecting an escape. I told him that I do not know Giannino and therefore could not trust him but I also said that if he felt confident about speaking to him to go ahead and try. At this time Garcia did not know I had made the first key. Harry Lupps, Ficconi and no other person was aware I had made the key to the first door.

I think Garcia decided not to approach Giannino because Giannino was not in the right position to help us. However, about 6 weeks prior to Sept 22, Giannino was transfered to duty in the control room on the first floor and began working 4pm - midnight which was the same shift he was working on the third floor.

Immediately after Giannino began duty in the control room Garcia approached him and asked him "what would you want to get us the keys to the sallyport" or words to that effect and

also included the warehouse door. Giannino said he wanted $25,000 for the three keys impressions necessary for the escape; Giannino said he wanted $5,000 for an impression of the second or inner sallyport door key and the rest upon delivery of the other two impressions. Giannino had previously mentioned financial difficulty at home. Garcia came to me and told me Giannino is willing to give us the impressions so I cut several strips off a styrofoam cup, white in color, and gave them to Garcia with instructions to give them to Giannino and instruct Giannino to press the key to the second door into the styrofoam thus leaving an impression. Giannino was given the styrofoam by Garcia and the next day at the same night Garcia gave me back two strips of styrofoam bearing the impressions of both sides of the key to the second door. The reason Giannino started with the second door was because the first door was to be his security, that is, he decided to give Garcia the first door key impression last because he would then be sure to get his money. Giannino was asked to "start us off with the second or middle door" and then the warehouse and then the first door. Giannino

M.F.

A 629

made no bones about it and gave it to us in the order we wanted them.

The next day, or day after that, $1500 was placed in the trunk of Giannino's car, a 1968 Monte Carlo, not a new car but at least a couple of years old. Giannino had given Garcia a key to the trunk of his car for the purpose outlined above. Garcia gave the key to someone he knows who handled the money payoff and as far as I know the trunk key never was returned to Giannino I do not know where Giannino's car was parked the night the money was placed in the car trunk but I do know it was close to the jail. I saw the trunk key and it was silver in color but worn, revealing yellowish spots of tarnish.

Giannino asked Garcia for the other $3500 and was promised by Garcia that he would get it. Giannino said he trusted Garcia as a man and felt secure and confident that he would get his money, all his money. Within 7-10 days Giannino turned over to Garcia the impressions, in styrofoam, of the warehouse key in the same manner as with the second door. The day following the receipt of the impressions of the warehouse key I told Garcia that he would

MF

have to go back to Giannino and get him to make a tracing of the warehouse key and make notations about the dimensions of the key. The reasons I needed the tracing and dimensions was because even though I had filed down another piece of the brass strip referred to on page 2 and had made a key which fit perfectly into the styrofoam impression the key to the warehouse did not work. The key that I made from the impressions of the second door worked and therefor it was not necessary to have a tracing of that key. So Giannino made the tracing of the warehouse key on a 4 x 5 piece of paper the color of which I cannot recall and made notations similar to those I made on the sketch of the first key.

After receiving the tracing of the warehouse key I filed down my homemade key a little more and tried it in the door while working in the first floor sanitation area where I was assigned work. I was finally able to get the key to work in the warehouse lock and Harry Tuppen also tried it and it worked for him also.

We kept telling Giannino that the boys were were trying to make deal not working while actually

the keys made by me from impressions of the
Pound and warehouse door were sufficient and
opened the doors. By telling Giannino that they had
not been successful Giannino did not pressure
Garcia for more money.

After receiving the impression for the
warehouse door Garcia told Giannino that they
wanted to wait a while for impressions of the first
door but actually, at this point, 2-3 weeks prior to
Sept. 22, 1974, all three keys were completed and
worked. Giannino was never told that the
keys worked in the locks.

Barrera, Lopez, Ficcaro, Bornstein,
Luppino and Garcia all had knowledge of the
keys, and that they were being made, in addition
to myself. Then on four days prior to Sept. 22
we all sat down and decided to escape Sunday,
Sept. 22, 1974 because it would be a quiet day and
not one would be working in the warehouse. No other
inmates knew of our plans.

I want to also mention that around the
time of the escape Giannino was having physical
problems with his leg and had been admitted to
the hospital for a day or two and then came
back to work. Giannino then had to take more
pills.

M-1-

A 632

strike off from work because of a leg problem which causes him to walk with a limp. Giannino is in his middle twenties, 5'9", 160-165 lbs. black hair, no eye glasses, clean shaven. Gianni also told ~~Officer~~ me Simeone in Giannino's family, possibly his mother in law, was injured in an auto accident.

On Sept. 22, 1974, starting about 9:00 AM, I made several attempts to open the first door with my homemade key but it wouldn't open probably due to nervousness on my part. I tried unsuccessfully for about one hour. The sergeant then went upstairs to the third floor after the population had been fed we returned to the first floor area at about 12:30 pm and after one more unsuccessful attempt at about 12:30 pm I tried again at 12:40 or 12:45 pm and the door opened. I had stationed some of the seven teargas around the area so be sure no guards were nearby and when I successfully opened the first door the other six men followed me. To my knowledge no other inmates witnessed the above. I don't remember who had the key to the second door but the key successfully opened that door on the first try. I thought the second door was locked but it

(MLK)

A 633

us but I am not sure. The third door was opened by one of us, I can not remember which one, and we were then in the warehouse.

I recall that about 12 noon, prior to the escape, I heard inmate Simmons being paged and instructed to report to the first floor and because I knew he was a computer operator in the warehouse I interpreted that to mean that someone must be working in the warehouse area. But since we had already made up our minds to go we were determined to escape regardless of the fact that someone was working in the warehouse. I figured Simmons and the other person upstairs in the business office over the warehouse might turn the electronic overhead door open but I decided to take a chance.

When we got into the warehouse we walked over to the electronic door, I pushed the button and actually pushed the down button as the door was going up but it did not stop or come back down. We ran up the street where I had a car waiting for me and the other six were picked up by a truck with a 14 foot body, painted silver. I had arranged to have the car left for me with the keys left in the ash tray and a change

MLK

M. P.

A 634

clothes. I immediately drove over the Queensboro Bridge and to Northern Blvd. As I drove east on Northern Blvd I threw my prison pants, with the key to the first door in the pocket, out the window but over the tops of the car near a vacant lot on the right side of the street. The location was 3-4 blocks past the elevated subway.

I want to add that the other two keys I made were left in the possession of the other escapees. The keys were similar in color to the institution keys.

M. P.

I have read the above statement consisting of two pages and affirm that the facts and figures therein are true and factual to the best of my knowledge.

Witnesses:
Edward L Breen Special Agent FBI - 10/11/74
Edward J. Scheidat, Special Agent, FBI, NY NY 10/11/74

M. P. A 635

I clothes. I immediately drove over the Queensboro Bridge and to Northern Blvd. As I drove east on Northern Blvd. I threw my prison pants, with the key to the first door in the pocket, out the window but over the top of the car near a vacant lot on the right side of the street. The location was 3-4 blocks past the elevated subway.

I want to add that the other two keys I made were left in the possession of the other six escapees. The keys were similar in color to the institution keys.

M. P.

I have read the above statement consisting of two pages and affirm that it is true and correct to the best of my knowledge.

James Earl Ray

Witnesses:
Edward L. Breen Special Agent FBI - 10/11/74
Edward J. Holiday, Special Agent, FBI, NY NY 10/11/74.

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Exhibit A

This sketch was drawn by me 10/11/74 of the bag I made for the first lobby post door

Mari Perno

FRANK LUCAS 16 DOCKET NO. 75 Cr.687 637

JUDGMENT AND PROBATION/COMMITMENT ORDER

In the presence of the attorney for the government the defendant appeared in person on this date — MONTH 1 DAY 27 Y 7

COUNSEL

[ ] WITHOUT COUNSEL However the court advised defendant of right to counsel and asked whether defendant desir have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

[X] WITH COUNSEL Jeffrey Hoffman, Esq. of Counsel
(Name of counsel)

Defendant produced on writ of habeas corpus ad prosequendum.

PLEA

[ ] GUILTY, and the court being satisfied that there is a factual basis for the plea, [ ] NOLO CONTENDERE, [ ] NOT GUILTY

FINDING & JUDGMENT

There being a ~~finding~~/verdict of [ ] NOT GUILTY. Defendant is discharged [X] GUILTY.

Defendant has been convicted as charged of the offense(s) of unlawfully,wilfully and knowingly did distribute and possess with intent to distribute schedule I narc drug controlled substances,to wit;heroin. (Title 21, Sections 812,84 (1) and 841(b)(1)(A0 USC; Title 18, Section 2 USC,); and conspiracy to do.(Title 21, Section 846 U.S. Code.)

as charged in counts 1,5,6 and 7

SENTENCE OR PROBATION ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the co was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defe hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

TWENTY (20) YEARS on each of counts 1 and 5 to run concurrently with each other. TWENTY (20) YEARS on each of counts 6 and 7 to run concurrently with each other. TWENTY (20) YEARS on counts 6 and 7 to run consecutively to sentence imposed on counts 1 and 5 and now being served. (Total sentence FORTY(40) YEARS.
FINED $ 50,000.00 on each of counts 1,5,6,and 7. Fines totaling $ 200,000.00 are to be paid or he is otherwise discharged from law. This is a committed fine.

SPECIAL CONDITIONS OF PROBATION

(1) This sentence to be in addition to, and exclusive of the sentence now being served or to be imposed in the future.

Defendant placed on special parole for a period of XXX pursuant to Title 21, U.S Code, Section 841, to commence upon expiration of confinement.

DOCKETED AS A JUDGMENT # 76 10
ON February 4, 1976

MICROFILMED JAN 30 1979

ADDITIONAL CONDITIONS OF PROBATION

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT RECOMMENDATION

The court orders commitment to the custody of the Attorney General and recommends

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By _____ Deputy Clerk

SIGNED BY
[X] U.S. District Judge
[ ] U.S. Magistrate

1-27-76

Hon. Irving Ben Cooper

BEST COPY AVAILABLE

A 638

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA

-against-

FRANK LUCAS,

Defendant.

----------x

IND. NO. S75 Cr. 687 (IBC

NOTICE OF APPEAL

FILED
FEB 16 AM '76
U.S. DISTRICT COURT
S.D. OF N.Y.

NOTICE is hereby given that FRANK LUCAS, defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from a final judgment of conviction entered on the 27th day of January, 1976, after a verdict of guilty.

DATED: New York, New York
February 3rd 1976

JEFFREY C. HOFFMAN
Attorney for Defendant
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(212) 964-6226

TO: Hon. THOMAS J. CAHILL, ESQ.
Acting United States Attorney
Southern District of New York

Clerk of the U.S. District Court
Southern District of New York

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